(1)

91-371

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TAMPAM, INC.,

Petitioner,

v.

**OGLE COUNTY BOARD OF REVIEW,
SUPERVISOR OF ASSESSMENTS FOR OGLE COUNTY,
COUNTY TREASURER OF OGLE COUNTY,
also acting as Collector of Taxes, and
THE COUNTY OF OGLE,**

Respondents.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether appropriating privately owned farmland for use as private roads without due process and thereafter continuing to levy real estate taxes on the farmland being used for public roads is a violation of the Fifth Amendment to the United States Constitution for which attorneys' fees should be awarded to the prevailing parties in a class action filed pursuant to 42 U.S.C. §1983.

2. Whether the relevant market for establishing attorneys' fees for a private client pursuant to 42 U.S.C. §1988 is the forum where the lawsuit was pending or is the jurisdiction where the attorneys and client are located and where most of the legal work was necessarily performed. This same question applies to most federal fee-shifting statutes.

3. Whether the lodestar procedure established by Hensley v. Eckerhart 461 U.S. 424 (1983) and subsequent decisions of this court can be evaded by a state court in setting fees in a class action filed pursuant to 42 U.S.C. §1983.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties named in the caption are the same parties which were in the proceeding in the court whose judgment is sought to be reviewed.

There are no other parties to be identified under Rule 29.1.

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No. _____

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

Petitioners respectfully request the issuance of a writ of certiorari to review a decision of the Appellate Court of Illinois, Second District.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Second District, was filed January 31, 1991 and is reproduced in

full in Appendix A hereto. This is officially reported at 208 Ill. App. 3d 127, 566 N.E. 2d 905 (1991).

A petition for rehearing and for a certificate of importance was subsequently filed by plaintiffs and denied by the Appellate Court of Illinois, Second District, on March 6, 1991. 208 Ill. App. 2d 127, 566 N.E. 2d 905 (1991).

A petition to appeal as a matter of right pursuant to Illinois Supreme Court Rule 317 was denied by the Illinois Supreme Court on June 5, 1991. This is the date on which the time for seeking certiorari began to run.

The Supreme Court of Illinois did not enter an order on the alternative Petition for Leave to Appeal as a discretionary review pursuant to Illinois Supreme Court Rule 315, and the Clerk of the Supreme Court has written that no further order will be entered on the

Petition for Leave to Appeal. Copies of the foregoing order and letter of the clerk are included in Appendix B.

The opinion of the Circuit Court of the Fifteenth Judicial Circuit, Ogle County, Illinois was filed September 27, 1989 and is reproduced in Appendix C. It was not officially published but is the initial decision creating the Constitutional and Federal statutory issues in this appeal.

A supplemental opinion of the Circuit Court of the Fifteenth Judicial Circuit, Ogle County, Illinois was filed March 11, 1990 and is reproduced in Appendix D. It was not officially published.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) and Supreme Court Rule 13.1. The Illinois Supreme Court denied an appeal as a matter of right on June 5, 1991, although the

court did not specifically deny the alternative prayer for discretionary review. The Supreme Court's denial of the Petition to Appeal as a Matter of Right and Alternative Petition for Leave to Appeal is final. It effectively denies all of the relief sought by the Petition for Leave to Appeal.

STATUTES AND CONSTITUTIONAL PROVISIONS

The statute controlling plaintiff's petition for fees in this case is 42 U.S.C. §1988, as amended, which provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Count I of the Second Amended Complaint, which was eventually settled favorably to the plaintiff's claims, was a civil rights action brought under 42 U.S.C. §1983. 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance regulation, custom or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any

> citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...

The provisions of the Constitution of the United States which are involved in Count I are:

> AMENDMENT V
> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

> AMENDMENT XIV
> Section 1. All persons born or naturalized in the United

> States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The 1972 Illinois Constitution, Art. I, Sec. 2, provides:

> No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

The 1972 Illinois Constitution, Art. IX, Sec. 4(a), provides:

> Except as otherwise provided in this Section, taxes upon real property shall be levied uniformly by valuation ascertained as the General Assembly shall provide by law.

The pertinent parts of Section 20e of the Illinois Revenue Act (1989 Ill.Rev.Stat., ch. 120, Sec. 501(e)) are:

Cropland, permanent pasture and other farmland shall be defined according to U.S. Census Bureau definitions in use during the assessment year in question. Cropland shall be assessed in accordance with the equalized assessed value of its soil productivity index as certified by the Department and shall be debased to take into account factors including, but not limited to, slope, drainage, ponding, flooding, and field size and shape... Other farmland shall be assessed at 1/6 of its debased productivity index equalized assessed value as cropland. Wasteland shall be assessed on its contributory value to the farmland parcel. In no case shall the equalized assessed value of permanent pasture be below 1/3, nor the equalized assessed value of other farmland, except wasteland, be below 1/6, of the equalized assessed value per acre of cropland of the lowest productivity index...

STATEMENT OF THE CASE

This case involves an award of unreasonable attorneys' fees in violation of 42 U.S.C. §1988. The fees were awarded to the prevailing plaintiffs in a class action suit which had been filed pursuant to 42 U.S.C. §1983. The fee matter went up on an interlocutory appeal to the Appellate Court of Illinois which affirmed the trial court by a 2-1 decision.

The complaint was originally filed by TAMPAM, Inc. as an administrative appeal in the Circuit Court of Ogle County, Illinois contesting the assessor's procedures in assessing real estate taxes on the farmland of the named plaintiff in that county. The administrative appeal was from a final order of the Property Tax Appeal Board of the State of Illinois which had granted no relief to the farm owner.

After discovery disclosed that the assessment procedures being contested by TAMPAM, Inc. constituted the assessor's intentional pattern and practice throughout Ogle County, Illinois, an Amended Complaint was filed alleging a class action under 42 U.S.C. §1983 on behalf of all farm owners in that County. The class action was denominated as Count I of the Amended Complaint and the Administrative Appeal became Count II.

A Second Amended Complaint added the county as a defendant and realleged that the assessor had knowingly, intentionally, and continuously violated the Fifth and Fourteenth Amendments to the United States Constitution, equivalent provisions of the Illinois Constitution of 1970, and Sec. 20 of the Illinois Revenue Act (1989 Ill.Rev. Stats., Ch. 120, Sec. 501(e)). These violations of 42 U.S.C. §1983 consisted, inter alia,

of taxing farm owners for parts of public roads which encroached on their farmland (the "roads claim") and by failing to assess wasteland on the basis of its contribution to the farmland as specifically required by Sec. 20 of the Illinois Revenue Act (the "wasteland" claim). A copy of the Second Amended Complaint is Appendix E.

A class of farm owners was certified, and the Court appointed TAMPAM, Inc.'s private attorneys to represent the class, overruling objections of the Ogle County State's Attorney who represented the defendants. The corporation's home office, business files, and officers and directors were located in the Chicago metropolitan area, as was the office and supporting personnel of the corporation's attorney. Local counsel in Ogle County was employed for routine court appearances and filings, having

declined to take the case on the contingency of a Sec. 1988 award of fees.

When the case came on to be set for trial, the State's Attorney offered a settlement of two major issues raised by the Second Amended Complaint, the "roads claim" and the "wasteland" claim. The offer was accepted by TAMPAM, Inc.'s attorney who then drew up a settlement stipulation, a notice to class members, and a form for filing claims for taxes illegally assessed on land used for public roads. These documents were approved by an order drafted by the court which left open the fees to be awarded to the plaintiffs' attorneys pursuant to 42 U.S.C. §1988. The order is reproduced as Appendix F.

Because the case had been pending for some time and no final settlement or trial of the remaining issues was in sight, plaintiffs' lead counsel, who

by that time had become a sole practitioner, filed an interim Petition for Fees and Expenses pursuant to 42 U.S.C. §1988. No discovery was engaged in on the Petition for Fees, and at the oral argument on the Petition, only a general objection on the ground of excessiveness was filed by the State's Attorney.

After holding the matter under consideration for approximately eight weeks, the court entered a Memorandum Opinion on September 27, 1989 (App. C), reducing the claim for plaintiffs' attorneys' fees and expenses from an hourly based figure of $45,704 plus an enhancement claim of 50%, to $14,872. The result was achieved by several downward reductions which were founded upon an erroneous reading of the law and of the pleadings in the case. Fees and expenses for the "roads claim"

were denied entirely.

A motion for reconsideration was denied on March 21, 1990 but the fee award was increased to $18,174 based on the work for preparing the original fee petition. The court sua sponte authorized an interlocutory appeal in accordance with Illinois law.

The trial court's decisions were affirmed by a three-judge Illinois Appellate Court, Presiding Justice Reinhard dissenting (App. A-1). The Illinois Supreme Court denied an appeal on June 5, 1991 (App. B). Rule 13.1 of this court provides for a petition for a writ of certiorari to be filed within 90 days after the entry of an order denying "discretionary review". TAMPAM's petition sought an appeal as a matter of right and, alternatively, an appeal as a matter of discretion. Denial of the single Petition for an appeal terminated any

further possibility of a review of this case by the Illinois Supreme Court, however.

ARGUMENT

The three questions raised by this Petition are caused by the trial court's ruling on plaintiffs' Petition for Fees and Expenses. Except for the third question, they are fully discussed in the trial court's opinion (App. C) and in the decision of the Illinois Appellate Court (App. A and A-1). They are (1) whether taking private farmland for use as public roads without any due process whatsoever, and then taxing the appropriated real estate as though it were still owned by the farmer, violates the Fifth and Fourteenth Amendments to the United States Constitution, as well as the Illinois Constitution and the Illinois Revenue Act, so as to give rise to an action under 42 U.S.C. §1983 and

an award of fees to the prevailing party under 42 U.S.C. §1988; (2) whether, in evaluating fees for the prevailing party, the trial court can properly limit the relevant market to the forum, contrary to the guidelines approved in many cases following Hensley v. Eckerhart, 461 U.S. 425, f.n. 4 (1983) and S. Rep. No. 94-1011 (1976); and (3) whether the court's misuse of its "forum" rate and of the "amount involved" factor effectively undermines the lodestar measurement of a reasonable fee.*

I

The first question contains the facts within itself but needs amplification.

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*The "lodestar" concept was developed by this court in Hensley v. Eckerhart (supra) and is universally understood to mean "the number of hours reasonably spent on the litigation multiplied by a reasonable hourly rate." City of Riverside v. Rivera et al, 477 U.S. 561, 568 (1986).

The right-of-way of a common law public road in Ogle County, Illinois, is 66' wide. These roads were opened up years ago, and the County Assessor always excluded this 66' width from the tax assessment of the farms through which the roads passed.

With the advent of speedy automobiles, large self-propelled farm equipment, and asphalt paving, the county roads in some respects were "modernized." Sharp curves were widened and steep grades were flattened out by several degrees. To achieve these improvements, it was usually necessary to expand the width of the right-of-way by many feet, for example by beveling the passage through hills so that they would not erode. This widening was customarily done without condemnation or compensation but, as alleged in this lawsuit, the assessor continued to levy taxes on the farmland

which had been taken to improve the roads. It was to eliminate this long-established practice and to recover some of the taxes being collected in violation of the foregoing constitutional restrictions that Count I of the Amended Complaint was filed in part.

Count I was based solely on 42 U.S.C. §1983. Defendants' motions to dismiss both the Amended Complaint and the Second Amended Complaint were denied. When this case came on to be set for trial, the State's Attorney proposed to settle the "roads claim" by notifying all class members in writing that they could file a claim for taxes paid in 1988 on roads which encroached more than 66' onto their farmland and that the land being used as public roads would be removed from the tax rolls forever. The encroachment on plaintiff's farmland, for example, amountd to 6.8 acres which had been

illegally taxed for many years. Land classified as wasteland would be assessed at $1 an acre for the relevant year and at $0 thereafter, regardless of whatever contribution it may have made to the tillable farmland.

When the petition for interim fees came on to be heard, the State's Attorney merely argued that the amount requested for the partial settlement of the class action was "excessive." It therefore came as a surprise when the trial court sua sponte ruled that the roads claim was "never viable" as a Section 1983 action and that the relief requested on this claim was exclusively a common law action. This ruling was contrary to the allegations of the two amended complaints which were based on cases such as Pembauer v. Cincinnati 475 U.S. 469 (1986), as distinguished from Parratt v. Taylor, 451 U.S. 527 (1981). See

Zinermon v. Burch, ____ U.S. ____, 110 S.Ct. 975, 983, 108 L.Ed. 2d 100 (1990).

The taking of private land for a public use without compensation is clearly a violation of the "taking" clause of the Fifth Amendment, and to continue to tax the appropriated land is taking the proceeds of that land in violation of the Fifth Amendment. McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, __U.S.__, 110 Sup. Ct. 2238, 2250 110 L.Ed. 2d 17, 35-6 (1990).

The trial court never explained its common law theory for collecting taxes improperly assessed in the past. Plaintiffs' administrative appeal, the statutory method of contesting tax assessments in Illinois, could not accomplish this. But even assuming arguendo that there is some kind of common law cause of action to correct the illegal practice and procedure of the Ogle County

assessor, that could not preempt a Sec. 1983 action. Plaintiffs chose the latter form of relief and are entitled to use this alternative. Golden State Transit Corp. v. City of Los Angeles, ___ U.S.___, 110 Sup. Ct. 444, 107 L.Ed. 2d 420 (1989).

Finally, the "roads" claim is so substantively similar to the "wasteland" claim that the trial court was required to award reasonable fees for both. City of Riverside v. Rivera, 477 U.S. 561 (1986).

Nonetheless the trial court decided, without any visible support in the record, that the fees allocated to the "roads claim" must be totally eliminated. This effectively deprived plaintiffs of any fees on a cause of action which had been sustained by the court on the basis of Sec. 1983. The denial of attorneys' fees for the "roads claim"

is erroneous as a matter of law under the United States Constitution and violates the "reasonableness" requirement of 42 U.S.C. §1988.

II

The second question involves the meaning of the the phrase "relevant market" or "prevailing market rate" customarily used by this court in reviewing fees, e.g. Blum v. Stenson, 465 U.S. 886, 896 (1984). In every decision of this court with which we are familiar, the phrase has designated the place where the attorneys for the prevailing party do their work, and the reasonable fee is the one customarily charged by attorneys in that area for their private clients. Hensley v. Eckerhart, 461 U.S. 424 (1983).

In the case at bar, however, the court ruled that the forum was the relevant market and used that phrase

to award the hourly rate customarily charged in Ogle County, a rural area 100 miles west of metropolitan Chicago where plaintiffs' attorneys practiced law. The result: the court awarded a "reasonable and customary" fee of $95.00 an hour, in conflict with $190 an hour which the same court had found was the minimal value for the services of the same attorney in Chicago (App. 5, 9).

The forum rate is not one of the twelve factors to be taken into consideration pursuant to the seminal decision in Johnson v. Georgia Highway Express, 488 F.2d 714, (5th Cir. 1974). Johnson has been cited with approval by this court since Hensley v. Eckerhart (supra) and by many other federal courts as the comprehensive guideline for setting fees.

The trial court instead relied on the Seventh Circuit case of Chrapilwy

v. Uniroyal Inc., 670 F.2d 760 (1982). In that case the trial court awarded the prevailing rate in the forum (South Bend, Indiana), but was reversed by the Court of Appeals on the ground that plaintiff could not find attorneys of "equal quality...at a lower charge" in South Bend and were therefore justified in employing their usual Washington and New York attorneys at their usual rate. 670 F.2d 769.

The conditions for using Chrapilwy are contrary to good sense, however. The decision deprives a private client from being represented by its own attorneys if a cheaper alternative can be found in the forum several hundred miles away, or it requires the client's attorney to charge one rate at home and a different rate away from home. The decision confers a monopoly on the forum's attorneys in civil rights cases if

qualified counsel can be found there. What is "equal quality" and just how far the search need be engaged in to find it are questions best answered by the Delphic oracle, not by the trial judge in the forum.

In the case at bar, however, the trial court made those decisions for the plaintiff class, ignoring the decision which it had already made when it appointed plaintiffs' general counsel from Chicago to represent the class. Nor did the court at the time of ruling on the petition for fees identify the local lawyers who could and would take the case on a contingent basis; the only attorneys with an office in the county and with an a.v. rating in Martindell's had been in the case as local counsel on an hourly fee basis from the outset.

Thus, as a matter of fact, plaintiff had already satisfied Chrapilwy, as the

dissenting justice in the Illinois Appellate Court found. Instead, the trial court's award required plaintiffs' lead counsel to litigate the "roads claim" for no fee and to litigate the "wasteland" claim for less than the forum rate of $95.00 an hour. In fact the lodestar fee awarded is less than the overhead cost of lead counsel in Chicago ($111.52 an hour according to the affidavit of Bell, Boyd & Lloyd's managing partner). By the accumulated reductions of the fee petition, plaintiffs for prevailing on two claims alleged and settled under 42 U.S.C. §1983 received less than the hourly fee which TAMPAM, Inc. had paid to local counsel. This inequitable result was accomplished by the trial court without questioning the number of hours expended, the qualifications of plaintiffs' attorneys, or the fees which they normally charged other private parties.

Based as it is upon a misapplication of at least three rules of law, the fee awarded in this case is not reasonable, as required by 42 U.S.C. §1988. If the decision of the trial court and the majority opinion of the Appellate Court are allowed to stand, federal civil rights complaints and even anti-trust cases will seldom be filed by qualified attorneys in Ogle County nor in most of the other counties in Illinois. This court's considered treatment of civil rights cases involving intentional and continuing violations of the law by local officials will be frustrated in most of the state courts of Illinois.

III

The third question involves the methodology by which the state court judge determined the fee under 42 U.S.C. §1988. The outcome of a civil rights

class action should be quantitatively equal between the state and federal court systems. However, state courts have seldom undergone this type of review in a Federal civil rights case, and in the case at bar, the trial court completely misread federal law. Nor has the Illinois Supreme Court ruled on the two prior questions raised by this Petition.

The facts resulting in the plaintiffs' fee in this case are not in dispute: TAMPAM, Inc., a corporation domiciled in metropolitan Cook County, Illinois, found reason to believe that its real estate taxes on farm land were being illegally escalated, in violation of legislation effective in 1984 which was intended to alleviate some of the tax burden on this classification of land.

The corporation consulted its usual

attorneys in Chicago who, after the necessary legal research, filed an administrative objection to the 1986 assessment of selected tracts of land, including the illegal method of assessing wasteland and the taxing of portions of roads and highways which had been taken from the farm. The administrative process failed to provide any relief, the ultimate step being Count II of this lawsuit, filed against the Illinois Property Tax Appeal Board. This is the only method whereby farm real estate assessments can be statutorily contested in Illinois.

The cost of this procedure equals or exceeds the total amount of real estate taxes assessed annually on the farm, so when TAMPAM, Inc. discovered that all of the more than 5,500 farm units in the county were also being illegally assessed, a class action based on

42 U.S.C. §1983 was filed as Count I.

The local State's Attorney and the Attorney General of Illinois resisted both of the amended complaints by motions to dismiss, but the trial court ruled that Count I should stand and appointed plaintiff's metropolitan attorneys to represent the class, over defendants' objections. The plaintiff corporation, engaged as it was in an unprofitable industry, could not spend more than a minimum amount of attorneys' fees in the case and was unwilling to employ unknown and unrated local attorneys. There was no local attorney willing to take the case on a contingent basis, as pointed out in the dissent in the Appellate Court of Illinois (App. A-1).

Plaintiffs' lead attorneys had expended less than 300 hours on the case when an offer of settlement was received from the State's Attorney. Had the case

proceeded to trial at that point, the amount of time expended by counsel on both sides could well have doubled, and the court's expenditure of time would certainly have doubled. Therefore, plaintiffs waived all but one year of their claim for a refund of back taxes, and defendants agreed to reduce the future assessments of roads and wasteland to $0. A stipulation of settlement was approved by the court which specifically left open the claim for fees by prevailing counsel under 42 U.S.C. §1988 (App. F).

By the time the petition for fees had been prepared and argued by counsel, or before, the court had apparently made up its mind that this case was only "worth" about $18,000 in plaintiffs' attorneys' fees. It took the fee petition under advisement and sua sponte devised a method of reaching that result.

It appears obvious from the trial

court's decision that this was not a straight-forward exercise of discretion. The court adopted various legal strategies to chop down the unenhanced lodestar figure of $45,704. Its two principal theories and their fallacy are discussed in Questions I and II above.

After the court cut the total lodestar hours for plaintiffs' counsel from 305 hours to 199 by arabitrarily allocating 35% to the "roads claim", it specifically found that the minimal value of lead counsel's time in the Chicago area was $190 at Bell, Boyd and Lloyd and $150 an hour as a sole practitioner thereafter (App. C). To circumvent the result of this finding, the court imposed the same hourly rate as had been charged by the local Ogle County attorneys, $95.00 an hour for obtaining court dates and in other ways assisting lead counsel

without participating in the merits.

On this point it cited several Federal cases but not the 7th Circuit case of Chrapilwy v Uniroyal Inc. 670 F.2d 760 (1982). It remained for the dissent in the Illinois Appellate Court to point out that Chrapilwy had been satisfied by plaintiffs' counsel. Nor do any of the twelve factors in Johnson v Georgia Highway Express, 488 F.2d 712 (5th Cir. 1974) touch on any consideration resembling the "forum" rate.

The court then reduced the computation by another 20% to reflect the "amounts involved in the case and the results obtained" (App. C). This last reduction was pure sleight-of-hand because the "results obtained" by the settlement were 100% successful and the amounts involved were projected into infinity by the elimination of two types of farm real estate from tax assessments. As

Justice Reinhard said in dissenting, "...the trial court's decision to reduce plaintiff's attorneys' fees based [on the amount involved and the results obtained] is incomprehensible" (App. A-1). This reflects the Supreme Court's holding in Hensley v. Eckerhart, 461 U.S. 424 at 435: "Where a plaintiff has obtained excellent results, his attorney should receive a fully compensatory fee."

The absurd result of the trial court's procedure is to require plaintiffs' lead counsel to process a class action at less than the cost of overhead for his time in Chicago, to require Chicago and local counsel to be compensated at less than the regular, customary rate charged for the time expended even by a junior law clerk in Chicago, and to dampen the likelihood of further fee-shifting litigation being filed by private counsel in any state court outside of

the Chicago metropolitan area. In short, the trial court transferred the penalty for the local officials' wrongdoing over to the plaintiffs and their attorneys.

The result may conform to Illinois class-action law but is diametrically opposed to Federal civil rights cases. The trial court, having approved a complaint which is clearly based on such recent due process cases as Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) and Pembauer v. Cincinnati, 475 U.S. 469 (1986), reached back to the "isolated act" holding of Parratt v. Taylor, 451 U.S. 527 (1981). In doing so, both the trial court and the majority of the Appellate Court also miscited an Illinois decision on due process violations by a tax assessor, Beverly Bank v. Board of Review of Will County, 117 Ill. App. 3d 656, 453 N.E. 2d 96 (3d Dist. 1983), cert. denied 466 U.S. 951 (1984). This

conflict between Appellate Court decisions puts Illinois law on Sec. 1983 into confusion.

The trial court then seized upon the "forum" fee theory which has never been recognized in any case by the United States Supreme Court and is, in substance, in conflict with Blum v. Stenson, 465 U.S. 886 (1984). The outcome defeats the lodestar theory of fee determination which was fashioned specifically for civil rights litigation, treating this unique and intangible type of case as any other contingent fee class actions.*

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*In view of the egregiously inequitable result caused by the conflicts between the lower court's decisions and the law carefully crafted by this court, summary disposition might be appropriate, leaving Justice Reinhard's dissent standing as the law of this case.

CONCLUSION

We respectfully request that the Petition for a Writ of Certiorari be granted.

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APPENDIX A

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

TAMPAM, INC.,	)	Appeal from
	)	the Circuit
Plaintiff-Appellant,	)	Court of Ogle
	)	County.
v.	)	
	)	No. 88-TX-1
THE PROPERTY TAX APPEAL BOARD; OGLE COUNTY BOARD OF REVIEW; SUPERVISOR OF ASSESSMENTS FOR OGLE COUNTY; COUNTY TREASURER OF OGLE COUNTY, also acting as Collector of Taxes; and THE COUNTY OF OGLE,	)	
	)	Honorable Alan
	)	W. Cargerman,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE McLAREN delivered the opinion of the court:

Plaintiff, Tampam, Inc., appeals from an order of the circuit court which awarded attorney fees in an amount substantially less than plaintiff had requested. Plaintiff contends that the trial court erred by refusing to award

attorney fees for the work performed on a claim contained in its complaint and by using a lower than requested hourly rate to calculate the fee award. We affirm.

On October 24, 1988, plaintiff filed a second amended complaint. Count I of this complaint sought injunctive and monetary relief against the supervisor of assessments for Ogle County, the treasurer of Ogle County, and Ogle County itself for the alleged violation of plaintiff's civil rights. Count I was based on the Civil Rights Act. (42 U.S.C. §1983 (1989.) Plaintiff brought suit on its own behalf and as a representative of the following class:

> "All owners of farms in Ogle County, Illinois containing public roads or highways, waste-land, and other land which has been illegally and unconstitu-

tionally assessed and taxed by defendants."

Plaintiff alleged that its farm contained portions of roadways maintained as public roads, wasteland which makes no contribution to cropland, and fields of irregular size and shape. Plaintiff contended that the above-mentioned property was improperly assessed. Plaintiff admits that county officials exempted from taxation public roadways that encroached upon plaintiff's farmland, but alleged that the officials did not properly calculate the width of these roadways. Therefore, plaintiff was being overassessed. Plaintiff also complained that county officials were assessing all wasteland at $5 per acre when the statute required the wasteland to be assessed in relation to its contributory value to the farmland. Plaintiff asserted that these improper taxing procedures

violated the due process rights of the class, denied the class members the equal protection of the laws and were discriminatory. Plaintiff sought to recover the allegedly improper taxes that had been previously paid, to prevent defendants from collection of these taxes in the future, and to receive attorney fees, costs and expenses.

Count II of plaintiff's second amended complaint was a petition for administrative review of a decision of the Property Tax Appeal Board. Count II is not a part of this appeal.

Prior to trial, Count I was settled by a stipulation insofar as it involved taxes that were being assessed on public roads and highways that encroached on plaintiff's farmland and land classified as wasteland. Pursuant to the stipulation, if it was determined that a portion of a public road or highway had been

improperly taxed to a landowner for the year 1988 or thereafter, the amount of said tax would be refunded. Thereafter, the actual amount of a farm owner's land consumed by roads and highways would be assessed at the rate of $0 per acre for that landowner. Additionally, the stipulation provided that the assessment of all farmland in Ogle County which was classified as wasteland would be reduced from $5 per acre to $1 per acre for the 1988 tax bills and would be assessed at $0 per acre thereafter. Plaintiff's attorneys agreed to submit to the court their claims for fees and costs. The stipulation was approved by the court on May 2, 1989.

The issues of the assessor's failure to assess fields on the basis of their size and shape and the alleged improper classification of certain lands such as pastures and wood lots were not

settled by the stipulation. No judgment order disposing of Count I was entered, and no appeal was taken from the order approving the stipulation.

Plaintiff filed a petition for attorney fees and costs. The petition sought fees for lead counsel at the rate of $190 per hour while he was employed by the Chicago firm of Bell, Boyd & Lloyd and at the rate of $150 per hour while he was a sole practitioner. The total fee request for lead counsel was $43,312 plus a 50% enhancement due to the unusual and difficult nature of the case. Plaintiff also requested fees at the rate of $95 per hour for local counsel. This fee request totaled $6,140. The total fee request amounted to $74,694.

After a hearing on the matter, the court awarded fees in the reduced amount of $16,346. This award included a 35% reduction for the time spent on the roads

and highways claim. The court found that this claim was not viable as a section 1983 claim and was factually and legally distinct from the wasteland claim. The court also reduced the rate of compensation for lead counsel from $190 and $150 per hour to $95 per hour. The court also deducted an additional $3,000 from the award of fees to lead counsel and $800 from the award to local counsel to "reflect the amounts involved in the case and the results obtained."

On March 21, 1990, the court denied plaintiff's motion to reconsider the fee award. However, the court did award an additional sum for the preparation of the petition for fees and expenses.

Plaintiff appeals from the court's orders on fees and expenses entered on September 27, 1989, and March 21, 1990. This appeal was made pursuant to Supreme Court Rule 304(a) (134 Ill. 2d R. 304(a)).

This court issued an order asking the parties to be prepared at oral argument to cite legal authority supporting the proposition that wasteland may be granted exempt status or assessed at zero without a judgmental determination of its contributory value to the farmland parcel pursuant to section 501e. While this issue was addressed by the parties at oral argument, they did not cite statutory authority. We have determined that a resolution of this issue is not specifically required to review the case at bar. Therefore, any discussion of this issue has been omitted from this opinion.

We feel it is necessary to state expressly the limited nature of this review. This court expresses no opinion as to the propriety of the agreements made by the parties and contained in the stipulation. Additionally, this

opinion is limited solely to the issues raised by the appellant and countered by the appellees. Any other issues that may appear to have arisen as a result of the procedural history of this case or the unchallenged rulings of the court will not be discussed.

Attorney fees are recoverable in a civil action pursuant to section 1988, which states: "In any action or proceeding to enforce a provision of sections *** 1983, *** of this title, *** the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (42 U.S.C. §1988 (1989).) The amount of the fee award rests within the discretion of the trial court. Hensley v. Eckerhart (1983), 461 U.S. 424, 427, 76 L. Ed. 2d 40, 46, 103 S. Ct. 1933, 1941.

A plaintiff seeking attorney fees

under section 1988 must initially establish that he or she is the prevailing party. (Hensley, 461 U.S. at 433, 76 L. Ed. 2d at 50, 103 S. Ct. at 1939; Texas State Teachers Association v. Garland Independent School District (1989), 489 U.S. 782, ____, 103 L. Ed. 2d 866, 875, 109 S. Ct. 1486, 1491.) A party who prevails by way of a settlement order rather than through litigation is not precluded from claiming attorney fees as the prevailing party within the meaning of section 1988. (Maher v. Gagne (1980), 448 U.S. 122, 129, 65 L. Ed. 2d 653, 661, 100 S. Ct. 2570, 2575.) Once a party has obtained the status of a prevailing party, the court must review the circumstances presented and determine the proper amount of attorney fees to be awarded.

The starting point for determining the amount of fees to be awarded is the

number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. (Hensley, 461 U.S. at 433, 76 L. Ed. 2d at 50, 103 S. Ct. at 1939.) This sum is known as the "lodestar." The court may then, in its discretion, increase or decrease this lodestar amount. (Hensley, 461 U.S. at 434, 76 L. Ed. 2d at 51, 103 S. Ct. at 1940.) There are 12 factors the trial court should consider in arriving at an award of attorney fees under section 1988: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and

the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. (Johnson v. Georgia Highway Express, Inc. (5th Cir. 1974), 488 F.2d 714, 717-19.) The trial court should provide a clear and concise explanation if it chooses to cut back the number of hours spent on the case or grant less than the requested hourly rate. Tomazzoli v. Sheedy (7th Cir. 1986), 804 F.2d 93, 97.

We first review the court's decision that the public roads challenge was not a viable action under section 1983 and, therefore, plaintiff was not entitled to attorney fees under section 1988. The trial court stated that Ogle County's general guideline for estimating the

width of roads and highways located on plaintiff's property to determine the appropriate exemption from taxation was nothing more than an initial assessment tool and a fair substitute for costly governmental surveys. The court found that , "[i]f Tampam's class had a federal constitutional claim on this point, it must be as a violation of substantive or procedural due process, that taxes were imposed on exempt land, or that the guidelines and correction remedies yielded inaccurate valuations." The trial court held that this due process challenge could not be the basis of a section 1983 action because the State of Illinois provides adequate post-deprivation remedies.

In Parratt v. Taylor (1981), 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908, an inmate of a State prison brought suit against prison officials for the

value of certain hobby materials that were lost when normal procedures for receipt of packages were not followed. The inmate alleged a violation of section 1983 claiming he was deprived of property without due process of law. The Supreme Court held that summary judgment in favor of the prison officials was proper because the inmate had not properly alleged a violation of the due process clause of the fourteenth amendment. (Parratt, 451 U.S. at 543, 68 L. Ed. 2d at 433-34, 101 S. Ct. at 1917.) The court stated:

> "[T]he deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate nor is there any contention that

it was practicable for the State to provide a predeprivation hearing. Moreover, the State of Nebraska has provided respondent with the means by which he can receive redress for the deprivation. The State provides a remedy to persons who believe they have suffered a tortious loss at the hands of the State." Parratt, 451 U.S. at 543, 68 L. Ed. 2d at 434, 101 S. Ct. at 1917.

Plaintiff contends that the decision in Parratt has been clarified and narrowed by the Supreme Court in Logan v. Zimmerman Brush Co. (1982), 455 U.S. 422, 71 L. Ed. 2d 265, 102 S. Ct. 1148, and Hudson v. Palmer (1984), 468 U.S. 517, 82 L. Ed. 2d 393, 104 S. Ct. 3194. Plaintiff asserts that Parratt is now limited to situations involving the State's

commission of unforeseeable acts against an individual and does not apply to acts taken by a governmental official as a custom or practice that affect an entire class of plaintiffs. We disagree with such a narrow interpretation.

In Logan, an employee was discharged purportedly as a result of a physical handicap, and he filed a timely charge of unlawful termination with the Illinois Fair Emplcyment Practices Commission. Pursuant to established procedure (see Ill. Rev. Stat. 1979, ch. 48, par. 858), the commission has 120 days to convene a fact finding conference designed to obtain evidence, ascertain the positions of the parties, and explore the possibility of a negotiated settlement. However, apparently through inadvertence, the commission did not schedule the conference within the 120-day statutory term. The Illinois Supreme Court found

that the running of the 120-day term without a conference deprived the commission of jurisdiction to consider the employee's complaint. (See Zimmerman Brush Co. v. Fair Employment Practices Comm'n (1980), 82 Ill. 2d 99.) The court also determined that the employee's due process and equal protection rights were not violated as Illinois had provided for reasonable procedures to be followed upon the filing of a complaint. Zimmerman, 82 Ill. 2d at 108.

The United States Supreme Court reversed, stating that, "the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." (Logan, 455 U.S. at 434, 71 L. Ed. 2d at 276-77, 102 S. Ct. at 1157.) The court distinguished Parratt by noting that in Logan it was the State system itself that destroyed a

complainant's property interest by operation of law not a random and unauthorized act by a State employee as in Parratt. (Logan, 455 U.S. at 435-36, 71 L. Ed. 2d at 277-78, 102 S. Ct. at 1158.) The court noted that the employee was challenging the established State procedure that destroys his entitlement without due process not the commission's error. Logan, 455 U.S. at 436, 71 L. Ed. 2d at 278, 102 S. Ct. at 1158.

In the case at bar, like in Parratt, Tampam is complaining about the acts of the State. Tampam incorrectly equates its objections to the assessor's custom and practice of exempting only a standard width of road from the tax roll with an objection to the procedures and practices established by the State to obtain redress for the assessor's actions. This interpretation is not warranted

by existing case law.

Tampam has also misinterpreted the Supreme Court's decision in Hudson. Hudson was concerned with whether a prison inmate had a right of privacy in his prison cell entitling him to the protection of the fourth amendment, and whether the inmate's due process rights were violated when certain property was destroyed during a search of his cell. The court, stating that "the State's action is not complete until and unless it provides or refused to provide a suitable post-deprivation remedy," found that the inmate's due process rights were not violated as the State provided for an adequate post-deprivation remedy. Hudson, 468 U.S. at 534, 536, 82 L. Ed. 2d at 408-09, 104 S. Ct. at 3204-05.

In Beverly Bank v. Board of Review (1983), 117 Ill. App. 3d 656, taxpayers filed suit against the Will County Board

of Review alleging violations of due process and equal protection under section 1983. The plaintiffs contended that the defendant improperly increased the assessment of all industrial and commercial property. The defendant admitted that it acted under color of State statutes and the plaintiffs had been deprived of property by taxation. However, the defendant insisted there had been no denial of plaintiffs' constitutional right to due process. The court noted that Illinois statutes provide remedies for taxpayers who seek redress for excessive taxation and a party cannot maintain that he has been deprived of due process when he has declined to pursue the remedies which the State provides. (Beverly Bank, 117 Ill. App. 3d at 662-63.) The court concluded that "the action of the board of review, though illegal under the law

of Illinois, did not deprive plaintiffs of their property without due process of law because Illinois law provides additional remedies to protect taxpayers from just the sort of arbitrary action by taxing officials as had been alleged here." Beverly Bank, 117 Ill. App. 3d at 663.

We determine that the reasoning espoused in Beverly Bank and the principles set forth by the Supreme Court in the above-cited cases are applicable to the case at bar. The State's action of improperly calculating the width of the roads that encroach on plaintiff's property when computing an exemption is not complete until the post-deprivation remedy established by the legislature is exhausted to plaintiff's detriment. Plaintiff did not avail itself of the remedies established by the legislature, and, therefore, it cannot claim a

violation of due process. The court was correct in finding that plaintiff's public roads claim as alleged was not a viable due process challenge under section 1983.

Tampam claims that even if its due process claim concerning the roads issue fails, its equal protection claim on this issue should allow for attorney fees to be awarded under section 1988. Tampam cites Beverly Bank to support this position. While we note that the court in Beverly Bank did remand the issue of whether the Board of Review violated the plaintiff's equal protection rights, this action was taken in reviewing the grant of defendants' motion for judgment on the pleadings and dismissal. The court simply found that plaintiffs had sufficiently alleged a violation of equal protection rights in its complaint. The court did not address

the merits of the contention to determine if the plaintiff was entitled to attorney fees.

In the case at bar, Tampam is seeking attorney fees pursuant to section 1988 due to defendants' violation of equal protection. As stated earlier, to recover fees under section 1988, a party must achieve prevailing party status. (See Hensley, 461 U.S. at 433, 76 L. Ed. 2d at 50, 103 S. Ct. at 1939.) To prevail in an equal protection action, the plaintiff must establish intentional or purposeful discrimination. (Roche v. County of Lake (1984), 126 Ill. App. 3d 976, 983.) A discriminatory purpose is not presumed, and there must be a showing of clear and intentional discrimination. Roche, 126 Ill. App. 3d at 983.

While Tampam did allege elements of an equal protection violation in its

complaint, there is nothing in the record to show clear and intentional discrimination. The court did not make any findings that the defendants either intentionally or purposefully discriminated against Tampam, and the settlement agreement does not recite this fact. While it is true that Tampam may have stated a cause of action for violation of its equal protection rights such as was the case in Beverly Bank, it does not automatically follow that they have obtained prevailing party status on this claim and are entitled to attorney fees. We determine that the trial court was correct in finding that Tampam was not entitled to attorney fees pursuant to section 1988 for its public roads claim.

Plaintiff argues that, even if the public roads claim was not a viable section 1983 claim, it should receive attorney fees associated with this issue

because it is closely related to the wasteland claim. We disagree. A complaint alleging that county officials use certain established guidelines to calculate the width of public roadways that encroach upon farm owners' property when granting tax exemptions has nothing to do with a complaint that these same officials do not comply with statutory requirements when assessing wasteland. Evidence establishing one form of misconduct is not relevant to establishing the other form of misconduct. (See Lenard v. Argento (7th Cir. 1987), 808 F.2d 1242, 1246.) The trial court was correct in determining that the two claims were separate and distinct.

Plaintiff next claims that, even if the court was correct in eliminating the time spent on the public roads claim in calculating the fee award, the exclusion of 35% of the total time spent

on the case was arbitrary, excessive and in error.

Again, we note that the determination of a reasonable attorney fee award is within the discretion of the trial court. (Hensley, 461 U.S. at 427, 76 L. Ed. at 46, 103 S. Ct. at 1941.) In Ustrak v. Fairman (7th Cir. 1988), 851 F.2d 983, 987, the court stated:

> "If ever there was a case for reviewing the determinations of a trial court under a highly deferential version of the "abuse of discretion' standard, it is in the matter of determining the reasonableness of the time spent by a lawyer on a particular task in a litigation in that court. Not only is the trial court in a much better position than the appellate court to make this determination, but

> neither the stakes nor the interest in uniform determination are so great as to justify microscopic appellate scrutiny." (Ustrak, 851 F.2d at 987.)

A trial court should either attempt to identify specific hours that should be eliminated or simply reduce the award to account for the limited success of the plaintiff. (Texas State Teachers Association, 489 U.S. at ____, 103 L. Ed. 2d at 875-76, 109 S. Ct. at 1492.) While the above principles were set forth in cases where a plaintiff succeeded on some, but not all claims, we believe these principles are also applicable to situations such as the case at bar in which an award of attorney fees is available for some but not all of the claims raised.

The trial court provided this court with a clear and extremely thorough

discussion of its fee award in its order. The court set forth the applicable law and arrived at the conclusion that no more than 65% of the time spent on this litigation could be reasonably attributable to the wasteland challenge and the research and proceedings through which it straddled other issues. This court is not in a position to second-guess the trial court on this determination. We determine that the trial court's finding was not an abuse of discretion.

The remaining claim concerns the fee award granted to plaintiff as a result of the settlement of the wasteland claim. Plaintiff contends that the court erred in compensating plaintiff's attorneys at the rate of $95 per hour. Plaintiff cites Chrapliwy v. Uniroyal, Inc. (7th Cir. 1982), 670 F.2d 760, for the proposition that an attorney's own rate rather than the local forum rate is the

proper rate to be used in computing a reasonable attorney fee award. While Chrapliwy does provide this court with considerable insight into the appropriate rate to be used by the court in awarding fees, we do not share plaintiff's beliefs that Chrapliwy supports its position.

In Chrapliwy, the district court awarded attorney fees to prevailing plaintiffs. However, the court used a local forum hourly rate that was lower than the rate customarily charged by the plaintiffs' out-of-town attorneys due to the court's belief that it was mandated by law to do so. The reviewing court reversed the decision of the district court for failure to exercise its discretion and stated:

> "A judge may well approach high rates with skepticism, and he may exercise some discretion in lowering such rates.

***

If a high priced, out of town attorney renders services which local attorneys could do as well, and there is no other reason to have them performed by the former, then the judge, in his discretion, might allow only an hourly rate which local attorneys would have charged for the same service.

***

We think that a judge, in allowing an attorney's fees under Title VII or similar statute, has discretion to question the reasonableness of an out of town attorney's billing rate if there is reason to believe that services of equal quality were readily avail-

able at a lower charge or rate in the area where the services were to be rendered." Chrapliwy, 670 F.2d at 767, 769.

In the case at bar, the trial court expressly stated that "[m]any [attorneys] in the local bar, certainly Tampam's experienced local counsel Nye, could have quickly boned up on the applicable facets of section 1983 litigation; few if any would have been dissuaded by controversy from taking this straight forward tax case with its federal 'twist'." Plaintiff claims there was nothing in the record upon which the court could have based this conclusion. While it is true that the parties had not placed anything in evidence to establish the availability of local counsel, we find that the court could arrive at this conclusion without admitting evidence of this fact. The

trial judge in this case has been a member of the Ogle County judiciary and legal community for many years. It is certainly appropriate for a judge to use his background, experience and common knowledge when making a discretionary ruling. The affidavits of plaintiff's attorneys filed in support of its motion for reconsideration are not sufficient to refute the court's conclusion. Local counsel's affidavit states, "[t]o the best of my knowledge, no attorneys in the Fifteenth Judicial District would have been willing to take the aforementioned case." (Emphasis added.) Out-of-town counsel's affidavit states, "[n]or did affiant know of any private attorney in the western part of Illinois who would take this case." (Emphasis added.) There is no indication that either of plaintiff's attorneys had attempted to employ or even contact a

local attorney to determine if one would have been willing to take this case. Again, the court was extremely complete in its discussion of this issue, and we determine that its decision is not an abuse of discretion.

Plaintiff contends that this fee award does not even cover its attorney's overhead cost and will only serve to dissuade competent counsel from taking important civil rights cases. Awarding attorney fees based upon the cost of providing those services has been expressly rejected by the United States Supreme Court in Blum v. Stenson (1984), 465 U.S. 886, 79 L. Ed. 2d 891, 104 S. Ct. 1541. The court stated that reasonable fees awarded pursuant to section 1988 are to be calculated according to the prevailing market rates in the relevant community, and the policy arguments in favor of a cost-based

standard should be addressed to Congress instead of the court. (Blum, 465 U.S. at 895, 79 L. Ed. 2d at 899-900, 109 S. Ct. at 1547.) Under the specific findings of fact made in this case, the court did not err by using a local forum rate to compute attorney fees.

Plaintiff's final contention is that the court erred by reducing the award of attorney fees by an additional $3,000 for lead counsel and $800 for local counsel. The trial court reduced the award to "reflect the amounts involved in the case and the results obtained." Any downward modification of the lodestar figure should be for one of the enumerated factors and should be expressed in a dollar amount reflecting, as best as possible, the market value associated with the specific defect. (Lynch v. City of Milwaukee (7th Cir. 1984), 747 F.2d 423, 430.) The trial court

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specifically stated the reason for its reduction and the dollar amount of this reduction. An abuse of discretion occurs only when no reasonable person could take the view adopted by the trial court. (Lynch, 747 F.2d at 426.) We do not find that the court abused its discretion by reducing the lodestar figures by $3,000 and $800 respectively.

For the reasons stated above, the judgment of the circuit court of Ogle County is affirmed.

Affirmed.

GEIGER, J., concurs.

PRESIDING JUSTICE REINHARD, dissenting:

I respectfully dissent. In this case, the only issue before the trial court on plaintiff's petition for attorney fees was the amount of attorney fees pursuant to section 1988 (42 U.S.C. §1988 (1989)), not whether the "roads claim"

was a viable section 1983 action (42 U.S.C. §1983 (1989)) so as to entitle plaintiff to fees. Therefore, I would find that the denial of fees for the "roads claim" was error. Further, I would find that the trial court abused its discretion by reducing the hourly rate to the local rate and by further reducing the award to reflect the amount involved and result obtained.

Because the parties stipulated to a settlement of Count I, the trial court erred in determining the viability of the "roads claim" as a section 1983 cause of action. Count I of plaintiff's second amended complaint based on a section 1983 cause of action alleged that defendants violated the class' federally protected rights of due process and equal protection by improperly assessing and taxing certain types of farmland, including wastelands, lands containing

public roads, and lands of irregular size and shapes. The stipulation for settlement of Count I included, among other things, a description of the plaintiff as "[a]ll owners of farms in Ogle County, Illinois, containing public roads or highways, or wasteland, which has been illegally or unconstitutionally taxed." (Emphasis added.) The settlement also prescribes procedures allowing class members to obtain refunds for taxes improperly collected in the year of 1988 for taxes assessed against portions of public roads on private land and thereafter assessing public roads at the rate of $0 per acre for those landowners who were improperly taxed. The stipulation for settlement also agreed that plaintiff could recover attorney fees and stated "[p]ursuant to 42 U.S.C. sec. 1988, Plaintiff's attorneys will submit to the court their claims for

attorneys' fees and costs which have been incurred in connection with this litigation or for the claims involved in it." (Emphasis added.) Plaintiff was a prevailing party pursuant to section 1988. (See Maher v. Gagne (1980), 448 U.S. 122, 129, 65 L. Ed. 2d 653, 661, 100 S. Ct. 2570, 2575.) Defendants did not contend otherwise in the trial court. Therefore, the only issue presented to the trial court was the petition for fees.

In the hearing on the petition for attorney fees, defendants contested only the reasonableness of the fees sought by plaintiff. Specifically, defendants contested plaintiff's request for an enhancement, certain time discrepancies, the description of the work performed, the number of hours and the rate of pay. Defendants neither in their written response to the petition for fees nor

at the hearing contested the viability of the "roads claims." From the plain language of the stipulation for settlement, it is apparent that defendants settled the section 1983 claim involving public roads and highways. Therefore, the viability of the "roads claim" as a section 1983 action was not before the trial court. The only issue before the trial court was the reasonableness of the petition for fees. Thus, the trial court erred by sua sponte in his written decision addressing for the first time the issue of the viability of the "roads claim" as a section 1983 cause of action. Accordingly, without addressing the merits of whether of the "roads claim" is a valid section 1983 action as that issue was conceded by the settlement, I dissent from that portion of the majority opinion which affirms the trial court's decision not

to award attorney fees for the "roads claim."

I also disagree with the majority's conclusion that the trial court properly reduced plaintiff's attorney fees to the local rate. Although the majority correctly cites passages from Chrapliwy v. Uniroyal, Inc. (7th Cir. 1982), 670 F.2d 760, this case supports plaintiff's contention that the trial court erred in reducing the award. In reversing the trial court's reduction of attorney fees to the local rate, the United States Court of Appeals for the Seventh Circuit Court in Chrapliwy stated:

> "If, however, a party does not find counsel readily available in that locality with whatever degree of skill may reasonably be required, it is reasonable that the party go elsewhere to find an attorney, and the court should make the allowance on the basis of the chosen attorney's billing rate unless the rate customarily charged in that attorney's locality for truly similar services is deemed to require

an adjustment." Chrapliwy, 670 F.2d at 769.

If a plaintiff can show he has been unable through diligent, good-faith efforts to retain local counsel, attorney fees under section 1988 are not limited to the prevailing rate in the locality where the case is tried. Avalon Cinema Corp. v. Thompson (8th Cir. 1982), 689 F.2d 137, 140-41.

Contrary to the majority's conclusion, plaintiff employed a local counsel, Philip H. Nye, Jr., who had practiced law in Ogle County for almost 30 years. According to Nye's affidavit:

> "No attorney in the Fifteenth Judicial District would have been willing to take the aforementioned case on a regular hourly fee basis much less a contingency basis because of the uncertainty of the outcome of the litigation, the time-consuming complication imposed by the filing of a class action, and of litigation involving farm real estate taxes and a new and uncontested statute. Further adding to the reluctance of local attorneys to take the

> case in question is the fact that it involves filing litigation against local public officials."

Lead counsel's affidavit states, "[n]or did affiant know of any private attorneys in the western part of Illinois who would take this case on a contingent basis because of its high risk." I believe plaintiff adequately met his burden to show that local counsel, except for Nye who only provided legal assistance and was unwilling to act as lead counsel, were unwilling or unavailable to handle this case. Because both attorneys knew of no other local counsel who would take this case, it would seem futile for plaintiff to attempt to hire another local counsel, as the majority suggests, when attorney Nye with nearly 30 years of experience practicing law in the county knew of no other local attorney who would handle the case.

The majority also places great reliance on the trial judge's own opinion that many attorneys in the local bar, including attorney Nye, could have "boned up on the applicable facts of section 1983 litigation." Not only is there no basis in the record to support that conclusion but also there is no support for the majority's statement that the trial judge in this case had the experience and background to make such a determination. Neither does the majority cite any authority to support the proposition that the trial judge may use his own background, experience and common knowledge to refute the affidavits to the contrary filed by plaintiff on this particular issue where no such counteraffidavits are filed by defendants.

Therefore, on this record, I would conclude that the trial court abused

its discretion in finding services of equal quality were available at a lower rate in Ogle County than that charged by plaintiff.

I also disagree with the majority's conclusion that the trial court properly reduced the award of attorney fees by an additional $3,000 for lead counsel and $800 for local counsel. In reducing the award by these amounts, the trial court merely stated, "[a]fter much consideration and remembering our focus on the compensable 'wasteland claim,' we reduce the [lead counsel's] compensation by $3,000 and Nye's by $800 to reflect 'the amounts involved in the case and the results obtained.'" This one sentence is not a specifically stated reason, as the majority contends; rather, it is merely a conclusion by the trial court and not the reasons for the conclusion. (See Lenard v. Argento (7th

Cir. 1987), 808 F.2d 1242, 1247.) The United States Supreme Court has expressly stated that a trial court must provide a concise but clear explanation of its reasons for the fee award. (Hensley v. Eckert (1983), 461 U.S. 424, 437, 76 L. Ed. 2d 40, 53, 103 S. Ct. 1933, 1941.) Although the trial court's explanation is undoubtedly concise, it is not a clear explanation of its reasons.

Furthermore, the use of the phrase, "the amount involved and the results obtained," as a factor in awarding fees under section 1988 is explained in Johnson v. Georgia Highway Express, Inc. (5th Cir. 1974), 488 F.2d 714, 718. The court in Johnson noted the rationale behind this factor and stated, "[a]lthough the court should consider the amount of damages, *** that consideration should not obviate court scrutiny of the decision's effect on the law. If the

decision corrects across-the-board discrimination affecting a large class, *** the attorney's fee award should reflect the relief granted." Johnson, 488 F.2d at 718.

In this case, the trial court's decision to reduce plaintiff's attorney fees based on this factor is incomprehensible. Plaintiff brought a class action on behalf of all owners of farms against the taxing bodies of a predominately agricultural county to prevent the county from taxing farmlands improperly. In the settlement, defendants agreed to two procedures: first, it must reassess all wasteland in Ogle County at the rate of $1 per acre for 1988 taxes and thereafter at the rate of $0 per acre; and second, it must refund any revenue improperly collected from a landowner in Ogle County for taxes based on public roads and highways and

thereafter assess the rate at $0 per acre for that landowner. Clearly, rather than providing a basis to reduce the award of attorney fees, the factor pertaining to the amount involved and the results obtained actually bolsters plaintiff's right to an award of attorney fees.

Plaintiff prevailed in forcing defendants to reassess all wasteland on farms in an agricultural county at the rate of $0 per acre and to assess public roads and highways at the rate of $0 per acre for all landowners improperly taxed in the past. Therefore, the trial court abused its discretion by reducing the award of attorney fees for this factor.

United States of America

State of Illinois,)
Appellate Court,) ss.
Second District,)

I, LOREN J. STROTZ, Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the decision of the said Appellate Court in the above entitled cause of record in my said office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of the said Appellate Court, in Elgin, in said State, this 4th day of APRIL, A.D. 19 91.

/s/ Loren J. Strotz
Clerk Appellate Court,
Second District

APPENDIX B

State of Illinois
SUPREME COURT CLERK
Supreme Court Building
Springfield 62706

July 29, 1991

Mr. Thomas R. McMillen
Attorney at Law
560 Green Bay Road
Winnetka, IL 60093

In re: TAMPAM, Inc., petitioner,
v. The Property Tax Appeal Board,
et al., etc., respondents.
No. 71724

Dear Mr. McMillen:

In answer to your inquiry concerning the denial of your petition in the above cause, I wish to advise that the Court announces their decision of the cases on the leave to appeal docket in a bench announcement. This office then writes to counsel advising them of what action the court took. Also, even though you ask for alternative relief in your petition, the Court disposes of such petition with only one order.

A copy of the bench announcement for June 5, 1991, as well as a copy of the final order for the above cause is enclosed.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme
Court

JH:wr

STATE OF ILLINOIS
SUPREME COURT

At a Term of the Supreme court, begun and held in Springfield, on Monday, the thirteenth day of May, 1991.

Present: Ben Miller, Chief Justice
Justice William G. Clark
Justice Horace L. Calvo
Justice James D. Heiple
Justice Thomas J. Moran
Justice Michael A. Bilandic
Justice Charles E. Freeman

On the fifth day of June, 1991, the Supreme Court entered the following judgment:

No. 71724

Petitioner v. The Property Tax Appeal Board; Ogle County Board of Review; Supervisor of Assessments for Ogle County, also acting as Collector of Taxes; and the County of Ogle, Respondents	Petition for Leave to Appeal from Appellate Court Second District 2-90-0413 88TX1

The Court having considered the Petition for Appeal as a Matter of Right and being fully advised of the premises, the ——

Petition for Appeal as a Matter of Right is DENIED.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court, this twenty-seventh day of June, 1991.

/s/ Juleann Hornyak Clerk, Supreme Court of the State of Illinois

APPENDIX C

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
OGLE COUNTY, ILLINOIS

TAMPAM, INC., on behalf of itself and as the representative of a class,	)	
Plaintiff,	)	
v.	)	No. 88-TX-1
PROPERTY TAX APPEAL BOARD of the State of Illinois, et al.,	)	September 27, 1989
Defendants.	)	

MEMORANDUM OPINION

Alan W. Cargerman, Associate Judge:

Illinois property taxes are levied on the assessed valuation of real estate fixed by county and local assessors. Taxpayers can appeal overvaluations through county and state administrative boards to the circuit court. Class action suits are available in certain situations. Unless a refund account is created in the latter instance, however, neither

state remedy lets the prevailing taxpayer(s) collect attorney's fees for bringing suit. This case exemplifies a third approach, seeking relief under the liberal fee award provisions of the federal civil rights laws. We will never know whether plaintiff Tampam, Inc., really had a "federal case" against Ogle County tax authorities, for the suit was settled before trial. On the record presented, Tampam is entitled to recover attorneys' fees and expenses from the county of Ogle and its Supervisor of Assessments, although considerably less than it requests in its June 1989 petition.

Tampam began the suit as an administrative appeal of the 1986 valuation placed on its own Ogle County farm by the Supervisor of Assessments. After the Ogle County Board of Review and state Property Tax Appeal Board upheld the

assessments, attorney Philip H. Nye, Jr., of the Ogle County law firm of Fearer, Nye, Alberg & Chadwick filed for judicial review on January 8, 1988, under the state Administrative Review Act. (Ill. Rev. Stat. 1987, ch. 120, par. 592.4; Ill. Rev. Stat. 1987, ch. 110, par. 3-101 et seq.) Tampam challenged the alleged inclusion of tax-exempt public road rights-of-way in its and other Ogle County farm valuations, on whose behalf it proposed to bring a state-law class action. The Supervisor moved to dismiss on January 25 for nonjoinder and misjoinder of parties, the state Board on February 5 for misjoinder of the class action. Attorney Thomas McMillen of the Cook County bar, Tampam's president and principal stockholder, filed an appearance as lead counsel for the corporation on February 8.

The first hearing was held before Judge John L. Moore of this court on May 31, 1988, where attorneys McMillen and Nye moved for leave to file an amended complaint. The state Property Tax Appeal Board, Ogle County Board of Review, Ogle County Treasurer as ex-offico Collector of Taxes, and Ogle County Supervisor of Assessments were now defendants; Tampam's administrative review redesignated count II; and a new count I added, joining the road issue with the charge that Ogle County had also improperly assessed "other land of no agricultural economic value" in a class action seeking preliminary and permanent injunctive relief against the assessment, collection and disbursement of illegal farm taxes under Illinois common law - and, for the first time, section 1 of the federal Civil Rights Act of 1871 (42 U.S.C. 1983 [hereinafter section

1983]). The state Board objected to prosecution of the section 1983 action with the administrative appeal, but Judge Moore denied all defense motions and granted leave to file the amended complaint on June 3, 1988.

The case lay dormant until September 12, 1988, when Tampam filed a motion to preliminarily enjoin the Ogle County Treasurer from disbursing the second installment of 1987 Ogle County farm taxes to local government units. The motion was heard by this court on an emergency basis September 15 and denied the next day. (Tampam, Inc. v. Property Tax Appeal Board, Ill. Cir. Ct. No. 88-TX-1, mem. op. filed Sept. 16, 1988, at 1-11.) While ruling that a preliminary injunction was unavailable under Clarendon Associates v. Korzen (1973), 56 Ill. 2d 101, 306 N.E. 2d 299, we found the parties agreed that public roads lying

on or adjacent to farms were exempt from taxation; only the procedures under which those exemption determinations had been or were being made were in dispute.[1] Tampam's challenge to treatment of "other land of no agricultural value" was limited at the injunction hearing to the propriety of the county's admitted practice of valuing so-called farm "wasteland" at a flat $5.00 per acre rate[2] despite a contrary state Department of Revenue

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1 "(T)he General Assembly in section 19.9 of the Revenue Act of 1939 prohibits taxation of '...public grounds owned by a municipal corporation and used exclusively for public purposes...' (Ill. Rev. Stat. 1987, ch. 120, par. 500.9; see Ill. Const. 1970, art. I, sec. 6), and...the easements over which county and township roads pass through (plaintiff's) property are 'exempt from taxation.' (Application of County Collector (1st Dist. 1977), 48 Ill.App. 3d 572, (1st Dist. 1976), 44 Ill. App. 3d 327, 2 Ill. Dec. 859, 357 N.E. 2d 1302.) *** But as

2 "(P)laintiff's case at yesterday's hearing raises at least a fair likelihood of eventual success on the argument (citation omitted) that the defendant supervisor of assessment's implementation of the section 20e 'wasteland'

guideline.[3] (Tampam, Inc. v. Property Tax Appeal Board. Ill. Cir. Ct. No. 88-TX-1, mem. op. filed Sept. 16, 1988, at 1-11.)

Tampam filed a second amended complaint with leave of court on October 24, 1988, adding the County of Ogle as defendant and expanding count I to cover defendants' alleged failure to "debase" the value of cropland to reflect odd configurations. The County Board,

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plaintiff's counsel concedes, the evidence at the motion hearing indicates that while the portions of Lowden, Stone Barn and Flagg Roads which cross plaintiff's fee are included within assessable acreage, the (Ogle County) authorities give a 'zero' value and no taxable consequence to what

requirement (Ill. Rev. Stat. 1987, ch. 120, par. 501e) failed to conform to the statute. Defendant Harrison (the incumbent Supervisor of Assessments) testified that his office

[3] The Illinois Real Property Appraisal Manual distributed by the Department advises local assessors that "Wasteland will be assessed based on its contributory value. In many instances wasteland contributes to the productivity of other types of farmland. Some land may be more productive because wasteland provides a path for water to run

Supervisor of Assessments, and Treasurer filed amended motions on January 13, 1989, to deny class action certification and dismiss count I, contending the tax dispute did not give rise to a section 1983 federal claim, to which all were in any event immune, and that Tampam had an adequate administrative remedy which it had failed to exhaust under count II. Following hearing on February 8, Tampam was certified as the class

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the supervisor of assessments' records indicate are the easement rights-of-way. How the width of certain rights-of-way were calculated or given to the assessor; whether improper reliance was or is placed on 'average' width of county and township, dedicated or non-dedicated roadways; and whether any particular rights-of-way record did or does reflect reality-these

assesses all Ogle County 'wasteland' at a flat $5.00 per acre, be it a creek, timber tract, or possibly even gravel pit. (To be fair to the incumbent, the policy and actual 1986 assessment of plaintiff's farm preceded his appointment in February 1988.) But the statute clearly requires

off or a place for water to collect. In cases where wasteland has a contributory value, it will be assessed at 1/6 of the

representative for at least Ogle County farmers with "wasteland." The Ogle County Treasurer's limited role in the assessment process relieved him of liability[4], but the dismissal motions of the County Board and Supervisor of Assessments were denied. Each would be required to answer or otherwise defend against "civil rights liability for any improper assessment practices which might rise to constitutional levels." (Tampam, Inc. v.

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and other issues of law and fact may become significant as the case moves to trial." (Tampam, Inc. v. Property Tax Appeal Board, Ill. Cir. Ct. No. 88-TX-1, mem. op. filed Sept. 16, 1988, at 7-8, 8)

'wasteland' assessment based 'on its contributory value to the farmland parcel.' (Ill. Rev. Stat. 1987, ch. 120, par. 501e) That is not to say that the challenge to

value of the lowest productivity index of cropland certified by the Department. When wasteland has no contributory value, a zero

4 "(T)he amended motion to dismiss filed by defendant Ogle County Treasurer be and is hereby granted, subject to the retention of jurisdiction to implement any relief

Property Tax Appeal Board, Ill. Cir. Ct. Ogle County No. 88-TX-1, mem. op. filed March 6, 1989, at 2-3.)

The case was set for trial on April 20, 1989, at which time we were advised that a settlement had been reached and an agreed order would be submitted for the court's approval. The May 2 stipulation was executed by Tampam's attorneys McMillen and Nye and the Ogle County state's attorney, as counsel for the

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the Ogle County practice will ultimately prevail, or be grounds for relief. (Compare People ex rel. Lovelace v. Heldebrandt (5th Dist. 1984), 128 Ill. App. 3d 359, 83 Ill. Dec. 689, 470 N.E.2d 1109, with Application of Johnson (3d Dist. 1986), 141 Ill. App. 3d 492, 96 Ill. Dec. 714, 491 N.E. 2d 1174.) But the argument is at least viable." (Tampam, Inc. v. Property Tax Board, Ill. Cir. Ct. No. 88-TX-1, mem. op. filed Sept. 16, 1988, at 10.)

assessment is recommended." (Ill. Dept. of Revenue, Illinois Real Property

hereinafter granted against other defendants." (Tampam, Inv. v. Property Tax Appeal Board, Ill. Cir.

County of Ogle, its Supervisor of Assessments, and the Ogle County Treasurer.[5] Under the agreement, Tampam was certified as the class representative for "[a]ll owners of farms in Ogle County, Illinois, containing public roads or highways, or wasteland, which ha[d] been illegally or unconstitutionally taxed," any of whom were given the opportunity to opt out of the class and pursue their individual remedies. The Supervisor of Assessments agreed to reduce the "wasteland" tax rate from $5.00 to $1.00

Appraisal Manual (Feb. 1987), at F3. (See Tampam, Inc. v. Property Tax Appeal Board, Ill. Cir. Ct. Ogle County No. 88-TX-1, mem. op. filed Sept. 16, 1988, at 10.)

Ct. Ogle County No. 88-TX-1, order filed March 6, 1989, at 2.)

Tampam apparently abandoned its claims against the Ogle County Board of Review and, in the count II administrative appeal, the state Property Tax Appeal Board; neither of those defendants were parties to the May 2 stipulation.

per acre on all 1988 tax bills payable in 1989, and totally eliminate the tax in later years. No provision was made for "wasteland" refunds in earlier tax years. Class members would be notified that tax-exempt public road and highway rights-of-way may have been included in farm valuations and of procedures to correct the assessment records and secure a 1988 refund.[6] The "debasement" issue was abandoned. Finally, the stipulation provided that "[p]ursuant to 42 U.S.C. [s]ec. 1988, plaintiff's attorneys will submit to the court

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[6] The Ogle County Treasurer as ex-officio Collector of Taxes agreed to "send a notice to all owners of farmland in Ogle County, Illinois, advising them that public roads or highways may be improperly taxed on their bills for 1988 and notifying them of their right to file a claim for any taxes improperly collected for roads or highways for the year 1988. This notice may be sent with bills for either installment of the 1988 taxes. The notice will advise the landowners of of the general guideline for width of

their claims for attorneys' fees and costs which have been incurred in connection with this litigation or for the claims involved in it, but said claims for attorneys' fees will not include any services which may be required of plaintiff's attorneys for the settlement or contest of any claims filed by members of the class for taxation of roads and highways on the 1988 tax bills." We approved the settlement as submitted on May 2. (Tampam, Inc. v. Property Tax Appeal Board, Ill. Cir. Ct. Ogle

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roads and highways which are exempt from taxation, as certified by the Assessor's answer to Interrogatory 11 in this case. The form for opting out of the class and for filing claims will be agreed to by the parties, will be under oath, will be due within 42 days of receipt by the landowner, and will be subject to verification or contest by the defendants. () If it is ultimately determined that a portion of a public road or highway has been improperly taxed to a landowner in Ogle County for the year 1988 or thereafter, the amount of such tax will be refunded, and thereafter roads or

County No. 88-TX-1, stip. for settlement filed May 2, 1989, at 1-3; ibid., order approving stip. for settlement filed May 2, 1989, at 1-4.)

Tampam's lawsuit eventually pursued three theories of recovery, the direct appeal of its own 1986 assessment under the Administrative Review Act; the Illinois common law class action on behalf of all Ogle County farmers; and the "federal case" under section 1983 of the Civil Rights Act. Illinois has always followed the so-called "American Rule", that parties to litigation bear their own attorney's fees absent a fee-shifting contract or statute. (Ritter v. Ritter

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highways will be assessed at the rate of $0.00 per acre for that landowner. *** No refund of taxes will be paid by defendants for taxes collected on waste-land or roads and highways except as provided...above." (Tampam, Inc. v. Property Tax Appeal Board, Ill. Cir. Ct. Ogle County No. 88-TX-1, stip. for settlement filed May 2, 1989, at 2,3.)

(1943), 381 Ill. 549, 46 N.E. 2d 41.) Neither the County of Ogle nor its Supervisor of Assessments agreed to pay Tampam's fees in the May 2 stipulation; the issue was merely left to the court to decide "[p]ursuant to 42 U.S.C. [s]ec. 1988" since, as previously noted, Tampam cannot recover attorney's fees for its direct appeal or the common law claim. (Kadlec v. Illinois Department of Public Aid (1st Dist. 1987), 155 Ill. App. 3d 384, 108 Ill. Dec. 181, 508 N.E. 2d 342 [Administrative Review Act does not authorize attorney's fees]; Hamer v. Kirk (1976), 64 Ill. 2d 434, 1 Ill. Dec. 336, 356 N.E. 2d 336 [fee-shifting not available in Illinois class action challenging tax assessments without creation of a refund account.) The United States Supreme Court in 1975 held that the "American Rule" also barred fee-shifting in section 1983 actions.

(Alyeska Pipeline Service Co. v. Wilderness Society (1975), 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141.) Congress responded by enacting the Civil Rights Attorney's Fee Award Act, codified as section 1988 to title 42 of the United States Code [hereinafter section 1988], to specifically provide that "[i]n any action or proceeding to enforce a provision of section[]...1983...of this title..., the Court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorney's fee as part of the costs." (42 U.S.C. 1988, Public Law 94-559, 90 Stat. 2641 (1976).)

Congress passed section 1983 after the Civil War in response to the Southern states' failure to control widespread racial violence against blacks. Although originally designated section 1 of the Ku Klux Klan act (ch. 22, 17 Stat. 13

(42nd Cong., 1st Sess.)), the statute[7] grants a broad federal remedy to any person or corporation whose rights under the federal Constitution or statutes are infringed by those acting "under color of" state law. (42 U.S.C. 1983.) In this case, Tampam alleged that Ogle County's treatment of "wasteland" and public roads violated its right within the scope of section 1983 to due process and equal protection of the laws under the fourteenth amendment to the federal Constitution. (U.S. Const., Amend. XIV.) Section 1983 actions may be brought

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7 "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (42 U.S.C. 1983.)

against local officials, such as supervisors of assessment, for "custom[s] or usage[s]" violating the Constitution, whether or not authorized by state law. (Monroe v. Pape (1961), 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492, overruled on other grounds, Monell v. Department of Social Services (1978), 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611; Adickes v. Kress & Co. (1970), 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed. 2d 142.) Municipal governments like the County of Ogle may be sued for their administrative practices (Monell), and those of subordinate policy makers (Pembaur v. Cincinnati (1986), 475 U.S. 469, 106 S.Ct. 192, 89 L.Ed. 2d 452). Only state and regional legislators have truly complete protection from section 1983 actions (Tenney v. Brandhove (1951), 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019; Lake County Estates v. Tahoe

Planning Agency (1979), 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed. 2d 401); other officials may have absolute or qualified immunity from paying money damages, but not (as here) against prospective injunctive relief and attorney's fees under section 1988. (See: Pulliam v. Allen (1984), 466 U.S. 522, 104 S.Ct. 79, 80 L.Ed. 2d 565 [judges]; Supreme Court of Virginia v. Consumers Union (1980), 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed. 2d 641 [prosecutors]; cf. Will v. Michigan Department of State Police (1989), ____ U.S. ____, 109 S.Ct. 2304, 106 N.E. 2d ____.)

Section 1988 grants authority to award the "prevailing party" in section 1983 actions "a reasonable attorney's fee as part of the costs." (42 U.S.C.

1988.) In fact, a prevailing plaintiff[8] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." (Newman v. Piggie Park Enterprises, Inc. (1968), 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed. 2d 1263, 1266; Satellink of Chicago, Inc. v. City of Chicago (1st Dist. 1988), 168 Ill. App. 3d 689, 119 Ill. Dec. 545, 523 N.E. 2d 13; compare cf. Bastian v. Personnel Board of City of Chicago (1st Dist. 1982), 108 Ill. App. 3d 672, 680-681, 64 Ill. Dec. 213, 219, 439 N.E. 2d 142, 148, vacated sub nom., Fagiano v. Police Board of City of Chicago (1983), 98 Ill. 2d 277, 292,

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8 Prevailing defendants in section 1983 actions only recover their attorney's fees if the lawsuit was "vexatious, frivolous, or brought to harass or embarass the defendant." (Hensley v. Eckerhart (1983), 461 U.S. 424, 429 n. 2, 103 S.Ct. 1933, 1937 n. 2, 76 L.Ed. 2d 40, 48 n. 2.)

74 Ill. Dec. 525, 532, 456 N.E. 2d 27, 34.) "If the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the part[y] sought in bringing suit', the plaintiff has crossed the threshold to a fee award of some kind." (Texas State Teachers Association v. Garland Independent School District (1989), 489 U.S. ___, ___, 109 S.Ct. 1486, 1493, 103 L.Ed. 2d 866, 877; see Hensley v. Eckerhart (1983), 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed. 2d 40, 50.) The plaintiff may "prevail" by going to trial or, as here, by vindicating its rights through pretrial settlement (Maher v. Gagne (1980), 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed. 2d 653) so long as the federal claim "remains intimately involved in the case until [the] settlement." (Caputo v. City of Chicago (1st Dist. 1983), 113 Ill. App. 3d 45, 48,

68 Ill. Dec. 843, 845, 446 N.E. 2d 1240, 1242.)

As for the amount of fees under section 1988, "counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'" (Blanchard v. Bergeron (1989), 489 U.S. ___, ___, 109 S.Ct. 939, 943, 103 L.Ed. 2d 67, 74). The most useful starting point, the so-called lodestar, is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate" (Hensley v. Eckerhart (1983), 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed. 2d 40, 50), which is then "presumed to be the reasonable fee contemplated by section 1988" (Blum v. Stenson (1984), 465 U.S. 886, 896, 104 S.Ct. 1541, 1548, 79 L.Ed. 2d 891, 901)). "[I]n some cases of exceptional success an enhanced award

may be justified" beyond the lodestar (Hensley, at 435, 103 S.Ct. at 1940, 76 L.Ed. 2d at 52), but the court in any event evaluates reasonableness in light of the time and labor required; the novelty and difficulty of the questions presented; the skill required to perform the legal service properly; the preclusion of other employment by the plaintiff's attorney in accepting the case; the customary fee; whether the fee is fixed or contingent; the amounts involved in the case and the results obtained; the experience, reputation and ability of the attorneys; the "undesirability of the case; the nature and length of the professional relationship with the client; and awards in similar cases. (See Johnson v. Georgia Highway Express, Inc. (5th Cir. 1974), 488 F.2d 714, at 717-719; Hensley; Blanchard).

Tampam contends the May 2 settlement qualifies it as the "prevailing party" under section 1988 and that it is presumptively entitled to collect at least lodestar fees from the County of Ogle and Supervisor of Assessments.[9] The June 30, 1989, petition suggests the lodestar for attorneys' fees be fixed at $45,703.90, consisting of $37,452.50 for its lead counsel McMillen[10]; $5,616.40 to local counsel Nye; and $2,635.00 for

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9 Tampam recognizes it has no right to fees from the Ogle County Treasurer, who was dismissed from the lawsuit (p. 4, supra), or the Ogle County Board of Review and state Property Tax Appeal Board, whose claims were abandoned (p. 5 @ n. 5, supra). "Section 1988 does not in so many words define the parties who must bear these costs. Nonetheless, it is clear that the logical place to look for recovery of fees is to the losing party - the party

10 As attorney McMillen conceded at oral argument, his exhibit totals are slightly at variance with the June 30th petition's prayer that he be awarded $43,312.75. As best we read his submissions, 215.5 hours were devoted to the litigation from the filing of the lawsuit on January 4, 1988, through May 30, 1989. The

early services provided by attorney Karen Suizzo, an associate with the Chicago law firm Bell, Boyd & Lloyd with whom McMillen was affiliated through 1988. Tampam additionally seeks a 50% enhancement of the McMillen fee to $56,178.75 for "exceptional success" (Hensley, 461 U.S. at 435, 103 S.Ct. at 1940, 76 L.Ed. 2d at 52) and $1,473.76 in expenses and costs, a grand total of $65,903.91.

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legally responsible for relief on the merits. That is the party who must pay the costs of litigation...and it is clearly the party who should also bear fee liability under section 1988." (Kentucky v. Graham (1985), 473 U.S. 149, 164, 105 S.Ct. 3099, 3104, 87 L.Ed. 2d 114, 120; compare Independent Federation of Flight Attendants v. Zipes (1989), ____ U.S. ____, 109 S.Ct. ____, 106 L.Ed. 2d ____ (intervenors).)

The first 130.25 hours were incurred while he was a senior counselor with Bell, Boyd & Lloyd in Chicago, which billed his services to other clients at the rate of $190 per hour. (Bell, Boyd actually raised its fees to $210 in December 1988, McMillen's last month of association.) The remaining 84.5 hours were expended

The County of Ogle and Supervisor of Assessments, through counsel, concede Tampam "prevail[ed]" and should recover a section 1988 award, but argue that fees anywhere approaching $65,000 in this case[11] are "excessive and not warranted by law." Citing the Seventh Circuit Court of Appeals decisions in Tomazzoli v. Sheedy (7th Cir. 1986), 804 F.2d 93, and Lightfoot v. Walker (7th Cir. 1987), 826 F.2d 516, they properly request we carefully assess

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from January 1 to May 30, 1989, after McMillen opened a private practice in Cook County. The $37,452.50 values the 130.25 hours at $190, 84.5 at $150 per hour.

11 The United States Supreme Court in City of Riverside v. Rivera (1986), 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed. 2d 466, upheld a $245,456 fee award under section 1988 where the prevailing attorneys' clients received only $33,350 in damages. Tampam's $65,000 request, if otherwise justified, could well be supportable under Rivera where the May 2 settlement permanently relieved Ogle County farm-owners of at least $2,300 in annual

the reasonableness of the Tampam attorneys' hours and rates to determine the lodestar, with fair adjustment reflecting Congress' intent in enacting the broadly remedial sections 1982 and 1988. (Hensley v. Eckerhart (1983), 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed. 2d 40.)[12]

We first consider whether Tampam had "substantial"[13] claims under section 1983, the predicate for section 1988

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in annual taxes on some 8000 acres of wasteland. (See, however, Rivera, 477 U.S. at 588, 106 S.Ct. at 2701, 91 L.Ed. 2d at 488 (Rehnquist, J., dissenting.)

12 "The fee applicant bears the burden of documenting to the satisfaction of the (circuit) court 'the appropriate hours expended and hourly rates.' 'Further, the applicant is expected to exercise 'billing judgment' in calculating his or her fee; excessive, redundant or otherwise unnecessary hours are to be omitted from the fee submission, and the applicant should command no more than an appropriate market rate...The

13 The lenient Congressional test of "substantiality" in this context was explored by the Maryland high court

fees. (See: Thaxton v. Walton (1985), 106 Ill. 2d 513, 519-520, 88 Ill. Dec. 624, 627, 478 N.E. 2d 1350, 1353; Leck v. Michaelson (1986), 111 Ill. 2d 523, 531, 96 Ill. Dec. 368, 371, 491 N.E. 2d 414, 417.) Our last order referred the parties to the Third District Appellate Court opinion in Beverly Bank v. Board of Review of Will County (3d Dist. 1983), 117 Ill. App. 3d 656, 72 Ill. Dec. 791, 453 N.E. 2d 96, cert.

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respondent then may challenge the reasonableness or accuracy of the rates or hours. 'When...the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product (rate times hours) is presumed to be the reasonable fee' to which counsel is entitled. 'This is in keeping with Congress' intent that it is 'necessary to compensate lawyers for all time reasonably expended on a case" (i)n order to ensure that lawyers would be

in County Executive of Prince George's County v. Doe (1984), 300 Md. 445, 459-461, 479 A.2d 352, 360-361 (reviewing H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. p. 4 @ n. 7 (1976) and Hagans v. Lavine (1974), 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed. 2d

denied, 466 U.S. 951, 104 S.Ct. 2153, 80 L.Ed. 2d 539, as a resource for determining defendants' "civil rights liability for any improper assessment practices which might rise to constitutional levels." (Tampam, Inc. v. Property Tax Appeal Board, Ill. Cir. Ct. Ogle County No. 88-TX-1, mem. op. filed March 6, 1989, at 2.) Taxpayers

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willing to represent persons with legitimate civil rights grievances. The (circuit) court's objective is to determine the market rate for the services reasonably required to produce the victory; if an attorney cannot expect this 'opportunity wage,' i.e., 'the compensation he would obtain by representing paying clients,' courts will not be able to induce attorneys to take civil rights cases. Of course, the (circuit) court in its discretion may exclude from the time to be compensated those hours it believes are based on inaccurate or misleading records. *** While '(t)he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,' 'the method of calculating a fee award rests within (the (circuit) court's) sound discretion.' There is no one correct formula for determining a fee award, and therefore the (circuit) court's calculation is anything

there brought a section 1983 action against Will County authorities for improperly increasing assessed valuations on industrial and commercial real estate. As here, the plaintiffs framed their challenge as both a violation of state law, which was admitted, and a denial of equal protection and due process under the fourteenth amendment. The circuit court dismissed the federal claims on the pleadings, and plaintiffs appealed. The appellate court reversed, holding that the equal protection allegations might succeed and should be tried, but that the section 1983 due process claim

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but an arithmetical exercise. Nonetheless, if the (circuit) judge wants to grant less than the requested hourly rate or cuts back the number of hours spent on the case, he must provide "a concise but clear explanation' 'of his reasons". (Tomazzoli v. Sheedy (7th Cir. 1986), 804 F.2d 93, at 96-97 (citations omitted).)

577). (Compare Brown v. Hornbeck (1983), 54 Md. App. 404, 458 A.2d 900.)

had to fail. (Beverly Bank v. Board of Review of Will County (3d Dist. 1983), 117 Ill. App. 3d 656, 72 Ill. Dec. 791, 453 N.E. 2d 96, cert. denied, 466 U.S. 951, 104 S.Ct. 2153, 80 L.Ed. 2d 539.)[14]

We reach the same conclusions in this case. Tampam's second amended complaint alleged that Ogle County's flat-rate wasteland valuation policy was not only at variance with Illinois law, but so systematic and discriminatory to the class of farmowners represented as to give rise to section 1983 liability

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[14] The Beverly Bank taxpayers were permitted to sue under section 1983 without exhausting administrative remedies. (117 Ill. App. 3d at 661, 72 Ill. Dec. at 794, 453 N.E. 2d at 99.) While the Third Circuit has since changed its view on that question (Raschke v. Blancher (3d Dist. 1986), 141 Ill. App. ed 813, 96 Ill. Dec. 711, 491 N.E. 2d 1171), the Beverly Bank opinion retains its authority on the substantive elements of a section 1983 tax challenge. As previously noted (p. 3, supra), Judge Moore rejected the exhaustion defense in this cause on June 3, 1988.

under the equal protection clause. (Compare Beverly Bank, 117 Ill. App. 3d at 663-665, 72 Ill. Dec. at 796-797, 453 N.E. 2d at 101-102; see, also, Allegheny Pittsburgh Coal Co. v. County Comm. of Webster County, West Virginia (1988), 488 U.S. ____, 109 S.Ct. 633, 102 L.Ed. 2d 688.) It is unclear whether Tampam could have proven the latter charge at trial, but the parties elected to settle. The wasteland allegations presented a "substantial" section 1983 claim warranting fees. (Texas State Teachers Association v. Garland Independent School District (1989), 489 U.S. ____, ____, 109 S.Ct. 1486, 103 L.Ed. 2d 866, 877; see Hensley v. Eckerhart (1983), 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed. 2d 40, 50.)

The public-roads challenge was never viable under section 1983, although it

was the strongest basis for state injunctive relief. (See Tampam, Inc. v. Property Tax Appeal Board, Ill. Cir. Ct. Ogle County No. 88-TX-1, mem. op. filed Sept. 16, 1988, at 6-9.) Ogle County's "general guideline for [estimating the] width of roads and highways which are exempt from taxation" at 66', 80' and 100' for township, county, and state/federal roadways respectively (p. 3 @ n. 1, supra; Tampam, Inc. v. Property Tax Appeal Board, Ill. Cir. Ct. Ogle County No. 88-TX-1, answ. to interrog. filed Dec. 12, 1988, at 5 [guideline used "unless other information indicates otherwise"][15], was nothing

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15 The bases for the guidelines were explained in the September 15, 1988, preliminary injunction hearing testimony of the Ogle County Supervisor of Assessments and Ogle County Supervisor of Highways. (Tampam, Inc. v. Property Tax Appeal Board, Ill. Cir. Ct. Ogle County No. 88-TX-1, mem. op. filed Sept. 16, 1988, at 3.)

more than an initial assessment tool, a fair substitute for costly government surveys. (Sunday Lake Iron Co v. Wakefield (1918), 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed. 1154; Coulter v. Louisville & Nashville Railroad Co. (1905), 196 U.S. 599, 25 S.Ct. 342, 49 L.Ed. 615; cf. Allegheny Pittsburgh Coal Co. v. County Comm. of Webster County, West Virginia (1988), 488 U.S. ____, 109 S.Ct. 633, 102 L.Ed. 2d 688.) If Tampam's class had a federal constitutional claim on this point, it must be as a violation of substantive or procedural due process, that taxes were imposed on exempt land, or that the guidelines and correction remedies yielded inaccurate valuations. (See p. 3 @ n. 1, supra). As Beverly Bank explained, such due process challenges cannot be the basis for section 1983 actions so long as state law affords adequate postdeprivation remedies.

(Beverly Bank, 117 Ill. App. 3d at 661-663, 72 Ill. Dec. at 794-796, 453 N.E. 2d at 99-101; Parratt v. Taylor (1981), 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 2d 420, overruled on other grounds, Daniels v. Williams (1986), 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed. 2d 662; Hudson v. Palmer (1984), 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed. 2d 383 [including intentional deprivations]; see Vann v. DeKalb County Board of Tax Assessors (1988), 186 Ga. 208, 211-212, 367 N.E. 2d 43, 47; Taylor, Section 1983 in State Court: A Remedy for Unconstitutional State Taxation, 95 Yale L.J. 414, at 430 n. 93 (1985).)[16]

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16 Parratt barred a simple tort claim, but the analogy made in Beverly Bank is far more justified than the other varied arguments advanced by most state courts for denying section 1983 state tax challenges. (Spencer v. South Carolina Tax Comm. (1984), 281 S.C. 492, 316 S.E. 2d 386, aff'd by equally divided court (1985), 471 U.S. 82, 105 S.Ct. 1859, 85 L.Ed. 2d 62; Zizka v. Water

The United States Supreme Court in Hensley v. Eckerhart (1983), 461 U.S. 424, at 434-435, 103 S.Ct. 1933, at 1940, 76 L.Ed. 2d 40, at 51, recognized that "[i]n some cases a plaintiff may present in one lawsuit distinct claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants--often an institution and its officers, as in this case--counsel's work on one claim will be unrelated to his work on another.

Pollution Control Authority of Town of Windham (1985), 195 Conn. 682, 490 A.2d 509; Johnston v. Gaston County (1984), 71 N.C. App. 707, 323 S.E. 2d 381, review denied (1985), 313 N.C. 508, 329 S.E. 2d 392; Stufflebaum v. Panethiere (Mo.1985), 691 S.W. 2d 271; Linderkamp v. Bismarck School Dist. No. 1 (N.D. 1986), 397 N.W. 2d 76; see Marx v. Truck Renting and Leasing Assoc., Inc. (Miss. 1987), 520 So. 2d 1333, 1347 (Robertson, J., concurring); Taylor, Section 1983 in State Court: A Remedy for Unconstitutional State Taxation, 95 Yale L.J. 414 (1985); compare Allison v. Board of County

Accordingly, work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result reached'. [Citation omitted.] The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." (Compare Blanchard v. Bergeron (1989), 489 U.S. ____, 109 S.Ct. 939, 103 L.Ed. 2d 67; Texas State Teachers Association v. Garland Independent School District (1989), 489 U.S. ____, 109 S.Ct. 1486, 103 L.Ed. 2d 866.) In our considered judgment, no more than 65% of the 305.62

Commissioners of Johnson County, Kansas (1987), 241 Kan. 266, 737 P.2d 6; City of Lake Worth v. Walton (Fla. App. 1984), 462 So. 2d 1137, 1140-1141; Lee County v. Zemel (Fla. App. 1989), 545 So. 2d 344, 346.)

hours expended by Tampam's attorneys[17] can be reliably attributed to the wasteland challenge and the research and proceedings through which it "straddled"[18] other issues. Time spent on the legally and factually distinct public road claim must be excluded from the lodestar. (Hensley; Texas State Teachers Association.)

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17 The 215.5 hours documented by attorney McMillen (supra at p. 9 @ n. 10), 59.12 hours for local counsel Nye, and 31 hours by associate Suizzo.

18 "The Supreme Court prescribed the basic approach to be taken in such cases in Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983); see also Leonard v. Argento, 808 F.2d 1242, 1245-46 (7th Cir. 1987). Factually unrelated claims are treated as separate lawsuits, and therefore if the plaintiff loses on such a claim (it) is not to be reimbursed for the attorney's fees allocable to it. But where the 'the plaintiff's claims for relief...involve a common core of facts or (are) based on related legal theories,' so that 'much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis...

We therefore reduce attorney McMillen's compensable hours from 215.5 to 140.08, local counsel Nye's from 59.12 to 38.44, and associate Suizzo's 31 hours to 20.15. The lodestar will be calculated on 198.67 hours' work.

The other lodestar component is the hourly rate at which counsel's services are to be compensated. Here the dispute is over lead attorney McMillen's request for compensation at the hourly rate of $190 before December 31, 1988, and $150 per hour thereafter. Local counsel Nye,

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> the (circuit) court should focus on the significance of the overall relief obtained by the Plaintiff in relation to the hours reasonably expended on litigation, '461 U.S. at 435, 103 S.Ct. at 1940. Unfortunately, the present case straddles the Court's two classes (emphasis added). The only claim on which (Tampam) prevailed is legally and factually distinct from (its) other claims, yet much of counsel's time necessarily was devoted to the litigation as a whole - a good example being the time taken (in most court appearances) *** A partially prevailing plaintiff should be compensated for the legal expenses he would have borne if his suit had been

a general partner for over 25 years in the Ogle County law firm Fearer, Nye, Ahlberg & Chadwick, asks for an award at $95 per hour, which his affidavit says "represents the usual and customary charge for legal services of a like nature in Ogle County". The supporting affidavit of attorney John B. Roe, also of Rochelle, affirms the $95 rate "is consistent with that of other senior attorneys in Ogle County with comparable skill and seniority who engage in litigation practice." (Tampam, Inc. v. Property Tax Appeal Board, Ill. Cir. Ct. Ogle County No.

> confined to the ground on which (it) prevailed plus related grounds within the meaning of Hensley. Under this approach we ask how much lawyer and (associate) time (Tampam) would have consumed had (it) brought this suit only to challenge the defendant's (wasteland policy). *** No exact calculation of the lawyer and (associate) time reasonably required to prepare (and) litigate...this case...if the case had been confined to its single meritorious issue is possible; our best estimate of this elusive counterfactual

88-TX-1, exh. G & H to plaintiff's pet. for fees and expenses filed June 30, 1989, 1-2.)[19] The research work of attorney Suizzo as an associate with McMillen's former Chicago law firm Bell, Boyd & Lloyd are billed at $85 per hour, within what we must conclude is the applicable Ogle County rate. It is abundantly clear, however, that McMillen's services in the Cook County area where he normally practices were minimally valued at $190 before he left Bell, Boyd & Lloyd in December, and at least the

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is that the time would have been (more than) half as great as it turned out to be with the additional, nonmeritorious issues." (Ustrak v. Fairman (7th Cir. 1988), 851 F. 2d 983, 988-989.

19 Tampam properly objected to a counter-affidavit of a phone survey to six Ogle County law offices, which in any event disclosed fee schedules for "civil work" at $75 to $100 per hour. (Tampam, Inc. v. Property Tax Appeal Board, Ill. Cir. Ct. Ogle County No. 88-TX-1, exh. C to response to plaintiff's pet. for fees and exp. filed July 24, 1989, at 1.)

$150 hourly rate requested during his current private practice.[20] Moreover, Bell, Boyd's managing partner fixes McMillen's overhead costs alone in his last year there at $111.52 per hour. (Tampam, Inc. v. Property Tax Appeal Board, Ill. Cir. Ct. No. 88-TX-1, plaintiff's reply on pet. for fees and expenses filed Aug. 14, 1989, exh. A.)

Tampam argues there is no authority to "reduce[] an attorney's reasonable and customary hourly rate because of the locality where the case was

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20 McMillen has practiced law since 1941 and worked at the Bell, Boyd firm for 20 years before serving two decades as judge of the circuit court of Cook County and then the United States District Court for the Northern District of Illinois. On retiring from the federal bench in 1985, he rejoined and served of counsel at Bell, Boyd until opening up a private Evanston office on January 1, 1989. McMillen's litigation experience and expertise during both Bell, Boyd periods have been ably documented by his former partner Francis J. Higgins and retired federal judge Philip W. Tone, each of whose affidavits support the

necessarily tried, because the attorney's compensation is determined by the value of his services, wherever rendered." (Tampam, Inc. v. Property Tax Appeal Board, Ill. Cir. Ct. Ogle County No. 88-TX-1, plaintiff's pet. for fees and expenses filed June 30, 1989, at 10.) We disagree. (Avalon Cinema Corp. v. Thompson (8th Cir. 1982), 689 F. 2d 137, 140-141; Donnell v. United States (D.C. Cir. 1982), 682 F.2d 240, 251-252; Louisville Black Policy Officers Organization, Inc. v. City of Louisville (6th Cir. 1983), 700 F.2d 268, 277-278; Horace v. City of Pontiac (6th Cir. 1980), 624 F.2d 765, 770; cf. Polk v. New York State Department of Correctional Services

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reasonableness of the $190 rate as "minimum ...compensation" for his services in a "complicated and difficult case under 42 U.S.C. 1983." (Tampam, Inc. v. Property Tax Appeal Board, Ill. Cir. Ct. Ogle County No. 88-TX-1, exh. B-D to plaintiff's pet. for fees and expenses filed June 30, 1989.)

(2d Cir. 1983), 722 F.2d 23; see Ramos v. Lamm (10th Cir. 1982), 713 F.2d 546, 555; Alexander v. City of Minneapolis (D. Minn. 1982), 545 F.Supp. 586; see Kirksey v. Danks (S.D. Miss. 1985), 608 F.Supp. 1448, 1457.) "[T]he case was necessarily tried" in Ogle County because of the uniquely local nature of state property taxes. Many in the local bar, certainly Tampam's experienced local counsel Nye, could have quickly boned up on the applicable facets of section 1983 litigation; few if any would have been dissuaded by controversy from taking this straight-forward tax case with its federal "twist". (Compare: Chrapilwy v. Uniroyal, Inc. (7th Cir. 1982), 670 F.2d 760; Maceira v. Pagan (1st Cir. 1983), 698 F.2d 38, 40.) On the record presented, attorney McMillen's services should be compensated at the prevailing

Ogle County rate of $95 per hour.[21]

The lodestar for attorneys' fees is accordingly fixed at $18,672.15, comprised of $13,307.60 as compensation for McMillen's services (140.08 hours at $95 per hour), $3,651.80 for Nye's work (38.44 hours at the same rate), and $1,712.75 for attorney Suizzo's research (20.15 hours at $85).

Both Tampam and the Ogle County defendants ask for adjustments to the $18,672.15 lodestar, "presumed to be the reasonable fee contemplated by

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[21] "As to the reasonable hourly rate, we conclude that the appropriate rate to be applied is the rate that would be charged by a competent and knowledgable attorney engaged to render legal services in the particular case. The rates to be applied should be those that would be charged by an adequately experienced attorney possessed of average skill and ordinary competence - not those that would be set by the most successful or highly specialized attorney in the context of private practice. *** An award that applies rates charged by

section 1988." (Blum, at 896, 104 S.Ct. at 11541, 79 L.Ed. 2d 891.) The "exceptional success" required for upward enhancement is clearly not present, for the lodestar provides more than adequate compensation. By the same token, any adjustment using the twelve Johnson factors described at pp. 8-9, supra, must recognize "that many of th[o]se factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." (Hensley, at 434 n. 9, 103 S.Ct. at 1940 n. 9, 76 L.Ed. 2d at 51 n. 9; compare

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attorneys of ordinary ability, skill and experience should be sufficient to satisfy the primary objection of (section 1988), namely,, to ensure that competent counsel will be available to all parties with bona fide civil rights claims. Further, an award made on the basis of such rates does not disserve attorneys who customarily charge higher rates to their private clients. In appropriate cases, they may charge clients in successful civil rights litigation the difference between a reasonable fee awarded under (section

Blanchard v. Bergeron (1989), 489 U.S. ____, 109 S.Ct. 939, 103 L.Ed. 2d 67.) The Seventh Circuit Court of Appeals suggests that, "in all but the most unusual circumstances, any downward modification of the lodestar figure should be for one of the enumerated factors and should be reflected in a dollar amount reflecting, as best as possible, the market value associated with the specific defect." (Lynch v. City of Milwaukee (7th Cir. 1984), 747 F.2d 423, 429-430.) After much consideration, and remembering our focus on the compensable "wasteland"

1988) and their normal rates. In those cases in which a civil rights client is unable to pay this difference, the additional fee or cost of litigation may either be absorbed by counsel on a pro bono basis, or, alternatively, the client can engage a reasonable experienced attorney of average competence and adequate skill whose billing rates would be acceptable under (section 1988). Either contingency furthers the essential goals of section 1988 - to enable citizens ready access

claim, we reduce the McMillen compensation by $3,000 and Nye's by $800 to reflect "the amounts involved in the case and the results obtained (supra, at p. 8)."

Tampam is awarded $14,872.15 in attorneys' fees: $10,307.60 for the services of attorney Thomas McMillen, $2,851.80 for the local counsel, Philip H. Nye, Jr., and $1,712.75 for the assistance of Bell, Boyd & Lloyd associate Karen Suizzo. In addition, McMillen is to be reimbursed $949.25 and Nye $524.51, or a total of $1,473.76, for their documented expenses and costs. (Heiar v. Crawford County, Wisconsin (7th Cir. 1984), 746 F. 2d 1190, cert.

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to legal representation in pursuit of their civil rights." (Singer v. State (1984), 95 N.J. 487, 500-501, 472 A.2d 138, 1245.)

denied, 472 U.S. 1027, 105 S.Ct. 3500, 87 L.Ed. 2d 631.) Since the Supervisor of Assessments was sued in his official capacity, the total award of $16,345.91 is entered solely against the defendant County of Ogle. (Brandon v. Holt (1985), 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed. 2d 878.)

So ordered.

APPENDIX D

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE
JUDICIAL COURT
OGLE COUNTY, ILLINOIS

TAMPAM, INC. on behalf of itself and as the representative of a class,	)	
Plaintiff,	)	
v.	)	No. 88-TX-1
PROPERTY TAX APPEAL BOARD of the State of Illinois, et al.,	)	March 21, 1990
Defendants.	)	

MEMORANDUM OPINION

Alan W. Cargerman, Associate Judge:

Plaintiff Tampam, Inc., joins a supplemental petition for attorneys' fees and expenses with its motion that we reconsider and increase the original award entered against the defendant County of Ogle. (Tampam, Inc. v. Property Tax Appeal Board, Ill. Cir. Ct. Ogle County No. 88-TX-1, order awaiting attys. fees and exp. filed Sept. 27, 1989, 1-2; ibid.,

mem. op. filed Sept. 27, 1989, 1-16.)

Tampam was awarded $16,345.91 on the June 30, 1989 petition, itemizing fees and expenses incurred by its lead attorney Thomas McMillen through May 30, and local counsel Philip H. Nye, Jr., through May 3, 1989. (Ibid., exh. D to plaintiff's pet. for fees and expenses filed June 30, 1989.) Since Tampam's petition was successful, additional fees and expenses should be awarded for services rendered through the July 24 hearing and August briefing. Applying the principles in our earlier opinion (ibid., mem. op. filed Sept. 27, 1989, 1-16), Tampam should be compensated for 15 more hours and $48.00 in expenses incurred by McMillen through August 14, 1989, and 3.75 hours and $18.63 in expenses for Nye through that same date. (Ibid., plaintiff's supp. pet. for fees and expenses filed Nov. 30,

1989.)

The supplemental petition for fees and expenses is therefore granted. Attorney McMillen's compensable hours are increased from 140.08 to 155.08, Nye's from 38.44 to 42.19. (Compare Tampam, Inc. v. Property Tax Appeal Board, Ill. Cir. Ct. Ogle County No. 88-TX-1, mem. op. filed Sept. 27, 1989, at 13.) The fee lodestar becomes $20,453.40, $14,732,60 for McMillen (155.08 hours at $95 per hour), $4,008.05 for Nye (42.19 hours at the same rate), and $1,712.75 for attorney Karen Suizzo's (20.15 hours at $85). (Ibid., at 15.) After the $3,800 Johnson reduction, net fees are $16,653.40: $11,732.60 for McMillen's services, $3,208.05 for Nye's, and $1,712.25 for Suizzo. With McMillen expenses increased from $949.25 to $997.25 and Nye's from $524.51 to $543.14, or $1,540.39, the total award is modified

to $18,173.79. (Ibid., at 16.)

Tampam otherwise moves for reconsideration of the original award, contending we misapplied the three-stage fee process mandated by Hensley and later Supreme Court decisions. (Tampam, Inc. v. Property Tax Appeal Board, Ill. Cir. Ct. Ogle County No. 88-TX-1, mem. op. filed Sept. 27, 1989, 1-16.) Stage 1 was the determination that Tampam's "public roads" claim was neither cognizable under section 1983 nor so closely related to the compensable "wastelands" issue to permit fees beyond the process followed in footnote 18 (ibid., at 10-13 & n. 18). Stage 2 found attorney McMillen should be compensated at no more than $95 per hour, a rate adequate to attract competent counsel for this litigation (ibid., at 14-15). Stage 3 applied one of the 12 so-called Johnson factors to reflect "'the amounts

involved in the case and the results obtained'" (ibid., at 16). Tampam argues that the reductions from its requested fee evidence a possibly-unintended "inhospitability" to the necessary prosecution of section 1983 local property tax challenges in state court, and an ultimate award less than adequate to effectuate the goals of the Civil Rights Attorney's Fee Award Act of 1976. We disagree, for the reasons and on the authorities discussed in our earlier opinion.

Tampam's supplemental petition for fees and expenses is granted, in part, and its award from defendant County of Ogle is increased to $18,173.79. Tampam's motion for reconsideration is denied.

So ordered.

APPENDIX E

IN THE CIRCUIT COURT OF OGLE COUNTY, ILLINOIS, 15th JUDICIAL DISTRICT

TAMPAM, Inc., on behalf of itself and as the representative of a class,	)	
Plaintiffs	)	88-TX-1
v.	)	Class action suit for
(1) Property Tax Appeal Board of the State of Illinois,	)	relief under 42 U.S.C. Sec. 1983 and Petition
(2) Ogle County Board of Review,	)	for Decision of Property Tax Appeal
(3) Supervisor of Assessments for Ogle County, Illinois	)	Board of Illinois
(4) County Treasurer of Ogle County, also acting as Collector of Taxes,	)	
(5) Ogle County, Illinois, a body politic,	)	
Defendants.	)	

SECOND AMENDED COMPLAINT

Plaintiff TAMPAM, Inc., by Thomas R. McMillen, Bell, Boyd & Lloyd, and Philip N. Nye, Jr., its attorneys, complains of the above-named defendants as follows:

COUNT I

1. This count is based upon Sec. 1983 of the Civil Rights Act of 1871 (42 U.S.C. Sec. 1983), under which this court has primary jurisdiction. Plaintiff seeks injunctive and monetary relief against defendants (3), (4) and (5), on behalf of itself and its class for violation of rights secured by the Constitution of the United States and by the laws and Constitution of the State of Illinois.

2. Plaintiff is an Illinois corporation which owns a farm in Ogle County, Illinois. Plaintiff pays and has for many years paid real estate taxes on portions of public roads and highways which lie within the legal description of its farm, on wasteland which makes no contribution to any cropland of said farm, and on other portions of the farm which are and have been illegally and

unconstitutionally assessed by the defendants.

3. Defendants (3) and (4) are public officials of Ogle County, Illinois who are responsible for assessing and taxing all farmland in that county and whose public acts bind defendant (5), Ogle County, Illinois.

4. Plaintiff sues on its own behalf and on behalf of the following class of similarly situated persons or entities:

> All owners of farms in Ogle County, Illinois containing public roads or highways, wasteland, and other land which has been illegally and unconstitutionally assessed and taxed by defendants.

5. The number of farmowners in Ogle County, Illinois who pay taxes on such lands is so numerous that joinder of them as plaintiffs in this action is impracticable. Common questions of law and fact are alleged for all of them by this complaint, and the complaint does not present any questions for

individual members which predominate over the common ones. Plaintiff will adequately and fairly protect the interest of all members of the class, and this class action is a fair and efficient method for adjudication of the controversy. Plaintiffs have no adequate remedy at law.

6. Plaintiff's farm contains parts of Lowden Road, Stone Barn Road, and Flagg Road (also known as Lost Nation Road) which are used and maintained as public roads. Plaintiff's farm also contains many acres of wasteland which make no contribution to the cropland. Some of this wasteland is improperly assessed and taxed as cropland and some is assessed and taxed as wasteland without a debasement of its value for its lack of any contributory value to the farmland parcels. Plaintiff's farm also contains many small fields of irregular size and

shape, the assessed value of which has not been debased, and contains permanent pastures, some of which is assessed improperly as cropland.

7. Assessments and taxes on the foregoing categories of land deprive plaintiff of the equal protection of the laws as compared to other farms in Ogle County, Illinois which do not contain the types of farmland referred to in paragraph 6 above, are therefore discriminatory against plaintiff, and deprive plaintiff of portions of its tax payments without due process, all in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States and Article I, Sec. 2 and Article IX, Sec. 4(a) of the Illinois Constitution of 1970. Said assessments and collection of taxes also violate the requirements of Sec. 501e of the Revenue Act of the State of Illinois (Ch. 120, Sec. 501e

of the Illinois Revised Statutes, 1987 Ed.)

8. Imposition of real estate taxes on farmowners in Ogle County, Illinois, whose farms contain parts of public roads and highways and wasteland which makes no contribution to cropland has been a practice and procedure of the defendants for many years. This causes their tax burden to be heavier than the tax burden on farms which do not contain public roads and highways or other land of no agricultural economic value. Also, since public roads and highways and other land which make no contribution to farmland are exempt from real estate taxes, plaintiff and the other members of its class are being deprived of their tax payments without due process of law. Plaintiff has attempted unsuccessfully to obtain an elimination of the taxes on these lands, including the appeal

alleged in Count II hereinafter, but defendants have knowingly and intentionally continued their discriminatory and unlawful taxing procedures up to the present time.

9. Plaintiff and members of its class are entitled to recover from defendants (3), (4) and (5) the real estate taxes which have been illegally collected from them in the past and to prevent the collection of these taxes in the future. They are also entitled to their attorneys' fees, costs and expenses, all pursuant to 42 U.S.C. Secs. 1983 and 1988.

WHEREFORE, plaintiff on behalf of itself and the members of its class pray this court to:

1. Certify the class and class representative alleged in paragraph 4 above;

2. Enjoin the defendant Ogle County

Treasurer and Collector of Taxes from collecting all real estate taxes which are illegally and unconstitutionally assessed against farmowners in Ogle County, Illinois;

3. Order the defendants County Treasurer and Collector and Ogle County, Illinois, to retain all tax receipts from roads and highways and other land of no agricultural economic value in Ogle County, Illinois which have been and may be received and to repay those receipts to the farmowners from whom they were illegally collected;

4. Enter judgment in favor of the plaintiff and the members of its class and against the defendants Supervisor of Assessments, the County Treasurer and Collector, and Ogle County, Illinois for the amount of taxes with interest which have been illegally and unconstitutionally collected and disbursed by

them and pay such amounts to the plaintiff and members of its class;

5. Order the defendant County Supervisor of Assessments for Ogle County, Illinois to revise his assessments of the portions of plaintiff's farm and those of the members of its class to conform to the requirements of Section 501e of the Revenue Act of the State of Illinois;

6. Grant such other temporary and permanent relief as may be appropriate under the circumstances and award plaintiff its reasonable attorneys' fees, costs and expenses.

COUNT II

1. This is a petition for administrative review of a decision of the defendant Property Tax Appeal Board dated 12-4-87. This decision affirmed a decision of the defendant Ogle County Board of Review postmarked 9-30-86. Plaintiff

is an Illinois corporation which owns a farm in Ogle County, Illinois. Defendant Supervisor of Assessments for Ogle County is the public officer responsible for assessing the valuation of farms for real estate tax purposes which results in the levying and collection of taxes by the defendant County Treasurer and Collector.

2. Plaintiff's farm contains parts of Lowden Road, Stone Barn Road and Flagg Road (also known as Lost Nation Road) which are used and maintained as public roads. Plaintiff's farm also contains wasteland, permanent pasture, and other farmland which are taxed by defendants under Parcels Nos. 22-10-300-001, 22-09-426-001, 22-09-451-001 and 22-09-476-001.

3. In July, 1986 plaintiff received a notice of assessment for the foregoing parcels and filed an appeal with the

defendant Ogle County Board of Review. The appeal requested, inter alia, that the foregoing roads and highways and other non-productive land not be assessed for real estate taxes. The Appeal was denied by the Ogle County Board of Review on or about September 30, 1986 and plaintiff appealed to the defendant Property Tax Appeal Board of the State of Illinois. That appeal was denied by a decision dated December 4, 1987, a true copy of which has been filed herein by the defendant Property Tax Appeal Board. No evidence was transcribed in that case which was decided solely upon the written pleadings of the parties.

4. The imposition of a real estate assessment and tax on the private owners of public roads and other non-productive land within farms in Illinois violates the Constitution of the State of Illinois and of the United States and is

constructively fraudulent, confiscatory, and discriminatory. Specifically, Chapter 120, Secs. 500.9 and 501e of the Illinois Revised Statutes (1985), also Art. I, Sec. 2, and Art. IX, Sec. 4(a) of the Constitution of the State of Illinois (1970) and the Fifth and Fourteenth Amendments of the Constitution of the United States are all violated by defendants.

5. In further support of this petition for administrative review, plaintiff incorporates by reference pars. 2, 3, 6 and 7 of Count I hereinabove.

WHEREFORE plaintiff prays this court to:

1. Reverse the decision of the defendant Property Tax Appeal Board entered on December 4, 1987 to the extent that it applies to public roads and highways and to other non-

productive farmland;

2. Order defendants to exempt from taxation the public roads and highways and other non-contributory land in plaintiff's Ogle County farm and to revise the plaintiff's tax assessments and bills accordingly;

3. Grant such other legal and equitable relief as may be appropriate under the circumstances.

TAMPAM, Inc., plaintiff,

By /s/ Thomas R. McMillen

Its attorneys

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APPENDIX F

STATE OF ILLINOIS))SS. COUNTY OF OGLE)		IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
TAMPAM, INC., on behalf of itself and as the representative of a class, Plaintiff, vs. PROPERTY TAX APPEAL BOARD OF THE STATE OF ILLINOIS ET AL. Defendants.		NO. 88-TX-1

ORDER APPROVING STIPULATION FOR SETTLEMENT

This matter coming on for hearing to approve Stipulation for Settlement executed by Plaintiff, TAMPAM, INC., by Thomas R. McMillen and Philip H. Nye, Jr., its attorneys, and Defendants, SUPERVISOR OF ASSESSMENT FOR OGLE COUNTY, ILLINOIS; COUNTY TREASURER AND COLLECTOR OF TAXES OF OGLE COUNTY, ILLINOIS; and OGLE COUNTY, ILLINOIS, a body politic; by Dennis Schumacher, Ogle County State's

Attorney, and Douglas P. Floski, Assistant State's Attorney;

And the court having examined the said Stipulation for Settlement filed herein and submitted for approval by the aforesaid parties;

And the court finding that said Stipulation fairly and reasonably settles all matters now in dispute between the respective parties, with the exception of Plaintiff's attorney fees and costs;

IT IS ORDERED, ADJUDGED AND DECREED as follows:

(1) Pursuant to Sect. 2-801 of the Illinois Code of Civil Procedure, Plaintiff is certified as the representative party of the following class: All owners of farms in Ogle County, Illinois, containing public roads or highways, or wasteland, which has been illegally or unconstitutionally taxed. Any class member may opt out

and has all the other rights and obligations of class members as provided in Secs. 2-801 and 2-806 of the Illinois Code of Civil Procedure.

(2) Defendant Supervisor of Assessments will reassess all wasteland in Ogle County at the rate of $1.00 per acre for 1988 taxes and will assess wasteland at the rate of $0.00 per acre for 1989 taxes and thereafter. Notices of this reduction of assessment need not be sent out until the normal assessment notices are mailed.

(3) Defendant County Treasurer and Collector of Taxes will send out tax bills based upon the foregoing changes of assessment for the year 1988 and thereafter.

(4) Defendant County Treasurer and Collector will also send a notice to all owners of farmland in Ogle County, Illinois, advising them that public roads

or highways may be improperly taxed on their bills for 1988 and notifying them of their right to file a claim for any taxes improperly collected for roads or highways for the year 1988. This notice may be sent with bills for either installment of the 1988 taxes. The notice will advise the landowners of the general guideline for width of roads and highways which are exempt from taxation, as certified by the Assessor's answer to Interrogatory 11 in this case. The form for opting out of the class and for filing claims will be due within 42 days of receipt by the landowner, and will be subject to verification or contest by the defendants.

(5) If it is ultimately determined that a portion of a public road or highway has been improperly taxed to a landowner in Ogle County for the year 1988 or thereafter, the amount of said tax will be

refunded, and thereafter roads or highways will be assessed at the rate of $0.00 per acre for that landowner.

(6) The stipulation will not affect any other claims that any members of the class may have with respect to taxes paid under protest or assessments which are subject to pending or future objections of a landowner, except that any claims based upon improper taxation of wasteland or roads and highways will be settled and disposed of pursuant to an order entered on this stipulation for any member who does not opt out of the foregoing class.

(7) No refund of taxes will be paid by defendants for taxes collected on wasteland or roads and highways except as provided in Par. 5 above.

(8) Pursuant to 42 U.S.C. Sec. 1988, Plaintiff's attorneys will submit to the court their claims for attorneys'

fees and costs which have been incurred in connection with this litigation or for the claims involved in it, but said claims for attorneys' fees will not include any services which may be required of Plaintiff's attorneys for the settlement or contest of any claims filed by members of the class for taxation of roads and highways on the 1988 tax bills.

(9) There is no just reason to delay enforcement of or appeal from this Order Approving Stipulation for Settlement.

Alan W. Cargerman
JUDGE

ENTERED this 2nd day of May, 1989.

(2)

No. 91-371

In The

Supreme Court of the United States

October Term, 1991

TAMPAM, INC.,

Petitioner,

vs.

OGLE COUNTY BOARD OF REVIEW, SUPERVISOR OF ASSESSMENTS FOR OGLE COUNTY, COUNTY TREASURER OF OGLE COUNTY, also acting as Collector of Taxes, and THE COUNTY OF OGLE,

Respondents.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois Second Judicial District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should deny the writ where the Illinois courts properly decided that Petitioner's legally and factually distinct public roads claim was never viable under 42 U.S.C. §1983, and that hours spent on this unrelated claim must be eliminated from the lodestar computation?

2. Whether this Court should deny the writ where the Illinois courts properly decided that this court should deny the writ where the Illinois courts properly determined that the forum rate provided a reasonable rate of compensation for Attorney McMillen.

3. Whether this Court should deny the writ where the Illinois courts properly decided that this court should deny the writ where the Illinois courts properly rejected Plaintiff's Petition for a 50% upward enhancement and properly decided to reduce the McMillen and Nye lodestars to reflect the amounts involved and the results obtained.

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Petition For Writ Of Certiorari To The Appellate Court Of Illinois Second Judicial District

BRIEF IN OPPOSITION

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. However, as treated more fully by the argument contained herein, Respondents do not believe Petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant the writ.

STATEMENT OF THE CASE

Respondents respectfully suggest that this Court disregard Petitioner's statement of the case. First of all,

Petitioner does not cite to the record as required by Rule 14.1(h). Secondly, Petitioner, in its statement of the case which is for factual material and not argument, attempts to color or even mislead the Court via certain statements. Specifically, the Petitioner alleges that its administrative appeal to the Property Tax Appeal Board granted no relief. (Petition for Writ at 9). Petitioner fails to tell the Court that Tampam, Inc. failed to appear at the hearing which was scheduled to hear evidence as to why the assessment by the Ogle County Board of Review was incorrect. In fact, Petitioner even failed to appear at the hearing by the Ogle County Board of Review where Tampam, Inc. should have provided evidence as to why the assessment of its property was allegedly incorrect.

Additionally, the Petitioner concludes that assessment procedures "constituted the assessor's intentional pattern and practice throughout Ogle County, Illinois . . . " (Petition at 10). As we argued at the Appellate Court of Illinois, Second District, and as the Court found, "there is nothing in the record to show clear and intentional discrimination." (See Appendix A, page 24 of the Petition).

Also on pages 10 and 11 in Petitioner's statement of the case, it states that its "roads claim" was a violation of 42 U.S.C. Section 1983. The trial court decided that "[t]he public-roads challenge was never viable under section 1983, . . . " (R. C-379). This conclusion was also affirmed by the Appellate Court of Illinois, Second District. (See Appendix A, page 22 of the Petition).

While the Petitioner may be correct when it says that Tampam, Inc.'s home office, business files, and officers

and directors were located in the Chicago area (Petition at page 11), it is likewise true that *inter alia*, the corporation owned real estate, transacted business, and paid taxes in Ogle County, Illinois.

In addition to Petitioner's contention that local counsel from Ogle County was employed for routine court appearances and filings (Petition for Writ, page 11), local counsel Philip H. Nye, Jr. of Fearer, Nye, Ahlberg & Chadwick, filed the original complaint which initiated this litigation (R. C-11) and remained involved in the litigation until the trial court proceedings had been concluded.

Lastly, Petitioner's statement of the case is argumentative and should be disregarded. For example, Petitioner alleges that the court's determination that $14,872 represented a reasonable attorneys' fee was "founded upon an erroneous reading of the law and of the pleadings in the case." (Petition at 13).

In lieu of Petitioner's statement of the case, we respectfully suggest that the Court consider the following as a more reliable statement of the case.

RESPONDENTS' STATEMENT OF THE CASE

The Plaintiff, Tampam, Inc., an Illinois Corporation, initiated this litigation as an administrative appeal of the 1986 real estate tax assessments levied against its Ogle County farmland. After the Ogle County Board of Review and the Property Tax Appeal Board of Illinois upheld the

assessments, the Plaintiff filed a complaint (R. C-11) seeking judicial review pursuant to the Illinois Administrative Review Act. The complaint was filed on January 8, 1988, by Philip H. Nye, Jr., of the Ogle County bar. Subsequent to Defendant's Motion to dismiss Petition for Administrative Review (R. C-21) and Motion to Strike (R. C-24), Attorney Thomas R. McMillen of the Cook County bar, filed an appearance. (R. C-28). Attorney McMillen also happens to be the president and principal stockholder of the plaintiff corporation, Tampam, Inc. (R. C-370) (hereinafter, Tampam).

On June 3, 1988, Tampam filed an amended complaint (R. C-52) which alleged that public roads and highways which lie within the legal description of its property, and other land of no agricultural economic value were being improperly assessed and taxed by Ogle County authorities. Additionally, Tampam sought certification as the representative party of all Ogle County farmers who were similarly situated. The Ogle County Board of Review was added as a defendant.

Count I of the Amended Complaint sought monetary relief as well as preliminary and permanent injunctive relief against the assessment, collection and disbursement of improper farm taxes. Included in Count I was, for the first time, a claim for relief pursuant to the Federal Civil Rights Act of 1871 (42 U.S.C. §1983).

Tampam's request for judicial review of the administrative appeal was now contained in Count II of the Amended Complaint.

On September 12, 1988, Tampam filed a Motion for Preliminary Injunction. (R. C-119). The Court conducted

an emergency hearing on the motion on September 15, 1988, and issued an Order (R. C-136) denying the Plaintiff's Motion for Preliminary Injunctive Relief and a Memorandum Opinion. (R. C-138).

On October 24, 1988, with leave of Court, Tampam filed a Seconded Amended Complaint. (R. C-154). Now the County of Ogle was a defendant and to Count I was added an allegation that defendants had not debased the value of farmland which contained fields of irregular size and shape.

After a hearing, the Court certified Tampam as class representative for " . . . all owners of farms in Ogle County, Illinois, contained wasteland . . . " and dismissed the Ogle County Treasurer from the suit but retained jurisdiction to implement relief which may be granted against other defendants. (R. C-270).

Plaintiffs and Defendants presented a Stipulation for Settlement (R. C-278) to the Court on May 2, 1989. The Court entered an Order Approving Stipulation for Settlement (R. C-281) on the same day. The stipulation for settlement as well as the Order were drafted by Attorney McMillen. The third paragraph of the Order (*Id.*) provides, "And the Court finding that said Stipulation fairly and reasonably settles *all* matters now in dispute between the respective parties, with the exception of Plaintiff's attorney fees and costs;" (emphasis added).

The Court ruled that Tampam had abandoned the "debasement" issue. (R. C-373).

On June 30, 1989, Tampam filed its Petition for Fees and Expenses. (R. C-289). The petition claimed that Attorney McMillen was entitled to compensation from defendants based on 161.25 hours valued at $190.00 per hour while employed at Bell, Boyd and Lloyd, a Chicago, Illinois, lawfirm. This amounted to $30,637.25. During the pendency of this matter, McMillen left Bell, Boyd and Lloyd and opened an office as a sole practitioner. McMillen claims that he worked 84.5 hours at an hourly rate of $150.00 which results in an additional $12,675.00 for a total of $43,312.25. Tampam provided affidavits from Chicago attorneys that these hourly rates were appropriate for McMillen's work based upon their knowledge of the Chicago market area. Tampam's petition next requested a 50% enhancement of this fee resulting in the total claimed for McMillen as $64,968.75.

An associate at Bell, Boyd and Lloyd, Ms. Suizzo, claimed 31 hours at $85.00 per hour for a total of $2,635.00.

Corresponding attorneys, Fearer, Nye, Ahlberg and Chadwick, of the Ogle County bar submitted a fee request based upon $95.00 per hour and an itemized expense record for a total of $6,140.91. (R. C-298). The total of fees and expenses which the plaintiff sought from the defendants amounted to $74,693.91.

In July, 1989, the Court conducted a hearing on Plaintiff's Petition for Fees and Expenses. The defendants conceded that Tampam had achieved sufficient relief, albeit not total relief, to qualify as a prevailing party, and was, therefore, entitled to recover a reasonable fee. However,

defendants argued that the amount requested was unreasonable. The court entered an Order Awarding Attorneys' Fees and Expenses (R. C-367) and a Memorandum Opinion. (R. C-369). The Court found that Tampam's wasteland issue presented a substantial section 1983 claim even though no opportunity was available to prove the allegation because the parties decided to settle before trial. This finding warranted the recovery of attorneys' fees. (R. C-379).

However, the Court held that "[t]he public roads challenge was never viable under section 1983[.]" (*Id.*) The Court also concluded that the public roads issue was legally and factually distinct from the wasteland claim. The Court determined that at least 35% of the hours expended by Tampam's attorneys were attributed to the public roads issue and excluded them from the lodestar computation. (R. C-381).

The Court next determined that the reasonable hourly rate for Attorney McMillen was $95.00 per hour – the same as for Tampam's Ogle County attorney who has been a general partner in the firm of Fearer, Nye, Ahlberg and Chadwick for more than 25 years. (R. C-382). Attorney Nye submitted an affidavit stating that $95.00 represented "the usual and customary charge for legal services of a like nature in Ogle County, Illinois." (R. C-335).

Attorney John B. Roe, also a member of the Ogle County bar, submitted a supporting affidavit which stated that the hourly rate of $95.00 "is consistent with that of other senior attorneys in Ogle County with comparable skill and seniority who engage in litigation practice." (R. C-336).

After multiplying what the Court determined to be a reasonable number of hours expended on this matter times the reasonable hourly rates, the lodestar was calculated to be a total of $18,672.15. (R. C-383).

The Court found that the exceptional success required to support Tampam's requested upward enhancement was "clearly not present, for the lodestar provide[d] more than adequate compensation". Based upon the amounts involved in the case and the results obtained, the Court reduced $3,000.00 from McMillen's compensation and $800.00 from Nye's. The defendant, Ogle County, was then ordered to pay a total award of $16,345.91. (R. C-384).

Following Plaintiff's Supplemental Petition for Fees and Expenses (R. C-411) and a hearing on the same, the Court entered a Modified Order Awarding Attorneys' Fees and Expenses (R. C-473.). The Court applied the same process as before and increased the total award to Plaintiff to $18,173.79. (R. 475).

Tampam filed a notice of appeal to the Appellate Court of Illinois, Second District, on April 19, 1990. The court, in a published opinion, *Tampam, Inc. v. Property Tax Appeal Board, et al.* (3d Dist. 1991) 208 Ill. App. 3d 127, 566 N.E. 2d 905, affirmed the decision of the trial court in all respects.

Tampam's subsequent petition for leave to appeal to the Illinois Supreme Court was denied on June 5, 1991 and its Petition for Writ of Certiorari to the Appellate Court of Illinois, Second Judicial District was filed with the Clerk of the United States Supreme Court on September 3, 1991.

STANDARD OF REVIEW

Since "the [trial] court [possesses] superior understanding of the litigation and the desirability of avoiding appellate review of what are essentially factual matters", *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), it is within the Court's sound discretion to determine the amount of the fee award. *Id.*

> If ever there was a case for reviewing the determinations of a trial court under a highly deferential version of the "abuse of discretion" standard, it is in the matter of determining the reasonableness of the time spent by a lawyer on a particular task in a litigation in that Court. Not only is the trial court in a much better position than the Appellate Court to make this determination, but neither the stakes nor the interest in uniform determination are so great as to justify microscopic appellate scrutiny.

Ustrak v. Fairman, 851 F.2d 983, 987 (7th Cir. 1988). (quotes in original).

ARGUMENT

I. THIS COURT SHOULD DENY THE WRIT WHERE THE ILLINOIS COURTS PROPERLY DECIDED THAT PETITIONER'S LEGALLY AND FACTUALLY DISTINCT PUBLIC ROADS CLAIM WAS NEVER VIABLE UNDER 42 U.S.C. §1983, AND THAT HOURS SPENT ON THIS UNRELATED CLAIM MUST BE ELIMINATED FROM THE LODESTAR COMPUTATION.

Tampam's counsel conceded that even though easements over which county and township roads pass

through its property are within its legal boundaries, the county taxing authorities have given the easements a "zero" value. (R. C-145). It is the *procedures* by which the widths of certain easements or rights-of-way were calculated that are in dispute. (*Id.*, see also R. C-371). As the Court observed, if Tampam had a constitutional claim on this issue, it must be as a violation of due process. (R. C-380).

> However, whereas "[w]e have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest,'" *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985) (citation omitted), it is well established that a State need not provide predeprivation process for the exaction of taxes. Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult. (citations omitted).

McKesson v. Division of Alcoholic Beverages & Tobacco, ___ U.S. ___, 110 Sup. Ct. 2238, 2250 (1990). (emphasis in original).

Where state law provides adequate post-deprivation remedies, due process has not been denied; and therefore, cannot be the basis for a §1983 action. *Beverly Bank v. Board of Review of Will County*, (3d Dist. 1983), 117 Ill.

App. 3d 656, 663, 453 N.E. 2d 96, 101, *cert. denied*, 466 U.S. 951.

In *Beverly Bank*, the plaintiff brought suit under 42 U.S.C. §1983 and alleged that the Board of Review increased real property assessments without affording class members a statutorily required hearing. As in the case at bar, the plaintiff alleged that the defendants had violated State law as well as denied them equal protection and due process pursuant to the Fourteenth Amendment of the Constitution of the United States. The *Beverly Bank* court held that although the action of the Board of Review was illegal under State law, the plaintiffs were not deprived of their property without due process of law because exactly that type of arbitrary action by taxing officials can be corrected by pursuing the remedies which the state provides. (*Id.*) Accordingly the Court affirmed the trial court's dismissal of the due process claim. In the case at bar, the trial court similarly found that an adequate post-deprivation remedy existed and, therefore, Tampam's public roads due process claim had to fail. As the *Beverly Bank* court quoted:

> These decisions do not amount to a requirement of exhaustion of administrative remedies as a predicate to a section 1983 claim. Rather, they express the logical propositions that a State cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail himself of them.

Id. quoting *Dusanek v. Hannon*, 677 F.2d 538, 543 (7th Cir. 1982).

As pointed out in Respondent's Statement of the Case, Tampam, Inc. initiated this litigation as an administrative appeal of the 1986 real estate tax assessments levied against its Ogle County farmland. The Ogle County Board of Review scheduled a hearing at which the Plaintiff could have presented evidence and argument as to why it believed that its farmland had been incorrectly assessed. Plaintiff failed to appear at the hearing and, hence, his appeal was denied. Plaintiff next appealed for relief from the Property Tax Appeal Board of Illinois. Once again a hearing was set for Plaintiff to present evidence and argument and, once again, Plaintiff failed to appear. Plaintiff's appeal was thus denied after which Plaintiff filed a complaint seeking judicial review.

Here, Plaintiff was afforded an adequate post deprivation remedy of which it failed to avail itself. Therefore, even if Plaintiff's assessment may have been incorrect, it was not deprived of property without due process of law.

"[T]he State's action is not complete until and unless it provides or refuses to provide a suitable post-deprivation remedy[.]" *Hudson v. Palmer*, 468 U.S. 517, 534-36 (1984). The court in *Hudson*, just as the court in the case at bar, found that the plaintiff's due process rights were not violated because the State provided an adequate post-deprivation remedy. *Id.*

The Court in *Beverly Bank* noted that plaintiffs had stated a §1983 cause of action, vis-a-vis its equal protection claim. It, therefore, remanded the case back to the circuit court for trial. A denial of equal protection requires more than misinterpretation of the law or even

application of the law in an arbitrary manner. The complaining party must prove that the alleged discrimination was intentional or purposeful. *Beverly Bank*, 117 Ill. App. 3d at 66[illegible], 453 N.E. 2d at 101. Applying this principle to the case at bar, because the parties settled this matter before trial on the merits, the court made no findings that the defendant either intentionally or purposefully discriminated against Tampam. Additionally, the settlement agreement did not stipulate that such was the case. Therefore, Tampam's allegation of an equal protection violation must also fail. Just as the due process claim could not serve as the basis of a §1983 action, neither can this unsuccessful equal protection claim.

Even where, as here, claims based on different facts and legal theories are advanced against the same defendants, work on unrelated, unsuccessful claims by counsel for prevailing parties requires that such claims be considered as if they had been raised in separate lawsuits. Accordingly, no fee is to be awarded for time pursuing the unsuccessful claims. *Hensley v. Eckerhart*, 461 U.S. 424, 434-435 (1983). The Court in the case at bar concluded that the public roads issue was never a viable §1983 claim. (R. C-381). Additionally, the court concluded that the claim was factually and legally distinct from the wasteland claim, and therefore, not properly compensable under §1988 in this case.

While the *Hensley* court held that legal services expended in pursuit of related claims, although unsuccessful, may be compensable, a plaintiff is not to be reimbursed for attorneys' fees which are allocated to factually unrelated, unsuccessful claims. *Lenard v.*

Argento, 808 F.2d 1242, 1245-56 (7th Cir. 1987), *Ustrak v. Fairman*, 851 F.2d 983, 988 (7th Cir. 1988).

The method by which county officials calculate the width of public roadways that pass through farm owners' property is factually and legally distinct from an allegation that county officials did not properly apply statutory requirements when assessing wasteland.

Because it is impossible to identify with precision the amount of time spent in pursuit of the unrelated and unsuccessful claims, the court is to use its best estimate of the time counsel would have expended on the successful claim(s) had the suit been restricted to the ground on which he prevailed plus related claims within the meaning of *Hensley*. *Ustrak*, 851 F.2d at 988-989. The court's best estimate as to the time expended by Tampam's attorneys was that no more than 65% of the hours claimed could be reliably attributed to the successful wasteland claim including all issues through which it straddled. (R. C-381).

From the foregoing, the court properly reduced Tampam's attorneys' hours and calculated the lodestar based on 198.67 hours worked.

At page 19 of the Petition for Writ of Certiorari, it is alleged that the Stipulation for Settlement (R. C-278) was only for a partial settlement of the class action. We strongly disagree. On May 2, 1989, the trial court entered an Order Approving Stipulation for Settlement (R. C-281). The Order said, "And the Court finding that said Stipulation fairly and reasonably settles *all* matters now in dispute between the respective parties, with the exception of Plaintiff's attorney fees and costs; . . . " *Id.* (emphasis

added). Additionally, the Petitioner itself, in its Plaintiff's Petition for Fees and Expenses (R. C-289), states that after it prepared and the Court approved a Notice to be sent to the class members, " . . . the attorney's services on the merits of the Complaint were *concluded.*" *Id.* at C-293. (emphasis added).

Contrary to Petitioner's assertion at page 30 of the Petition for Writ, the Ogle County State's Attorney did not proffer an offer of settlement in this case. Instead, it was the Petitioner who made the offer of settlement and the record documents this by the words of Petitioner's own counsel. Counsel writes, " . . . the defendant's (sic) attorneys reconsidered their opposition to *plaintiff's* offer of settlement." (emphasis added). The primary reason to point this out is to demonstrate yet another attempt by Petitioner to color the facts and the law to the point of possibly misleading the Court.

Petitioner incorrectly asserts that the only attorneys with an office in Ogle County and an a.v. rating in Martindell's (sic) was the local counsel, Philip H. Nye of the law firm of Fearer, Nye, Ahlberg and Chadwick. Other Ogle County attorneys with such designation include Moehle, Smith & Nieman; Fearer, Nye, Ahlberg & Chadwick; Williams & McCarthy; David K. Guest; William Barrick; and Robert Gosdick.

This argument by Petitioner, nonetheless, should be disregarded because it was not in the record below. However, even if the Court chooses to allow it, §1988 speaks not a word about plaintiffs choosing between rated and

non-rated attorneys in a publication by Martindale-Hubbell. Additionally, there is not a scintilla of judicial interpretation that lends any credence or weight to Petitioner's weak argument. In fact, Attorney McMillen, a former United States District Court Judge for the Northern District of Illinois, was the trial judge in the case of *Lenard v. Argento*, 808 F. 2d 1242 (7th Cir. 1987). The Seventh Circuit in *Lenard* said that §1988 allows only a reasonable fee. This means one which is large enough to attract competent counsel to represent plaintiffs, but no larger. *Id.* at 1247. Citing to H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8-9 (1976); S. Rep. No. 1011, 94th Cong., 2d Sess. 5-6 (1976); U.S. Code Cong. & Admin. News 1976, p. 5909; *City of Riverside v. Rivera*, 477 U.S. 561 (1986).

Again, in an attempt to subliminally mislead this Court, Petitioner states that the trial court appointed plaintiff's metropolitan attorneys to represent the class (see Petition at 11, 30). We acknowledge that the court appointed Tampam to represent the class of plaintiffs designated in the Second Amended Complaint (R. C-154). However, a distinction must be made between being appointed to represent the class and an appointment as the legal representative of the class. Here, the court did not appoint attorney McMillen as be the attorney for the class.

Attorney McMillen, on behalf of the Petitioner, accuses the trial court of deciding how much this case was worth at or before the time the Petition for Attorneys' Fees was presented. (Petition for Writ at page 31) and then devising a scheme by which it could achieve its objective. This assertion is absolutely ludicrous and there

is not a shred of evidence in the record to support this unwarranted accusation. Furthermore, it is clear from the scholarly Memorandum Opinion (R. C-369) prepared by the Court that it spent a great amount of time in deciding the attorneys' fees issue in this case.

As a minor point, but to once again correct the Petitioner, the court did make citation to *Chrapliwy v. Uniroyal, Inc.*, 670 F. 2d 760 (7th Cir. 1982) *cert. denied*, 461 U.S. 956 (1983), (R. C-383), contrary to the allegation in the Petition for Writ of Certiorari at page 33.

II. THIS COURT SHOULD DENY THE WRIT WHERE THE ILLINOIS COURTS PROPERLY DETERMINED THAT THE FORUM RATE PROVIDED A REASONABLE RATE OF COMPENSATION FOR ATTORNEY MCMILLEN.

Reasonable fees under §1988 are to be determined by the prevailing market rates in the *relevant* community. *Blum v. Stenson*, 465 U.S. 892, 896 (1984) (emphasis added). A majority of the Circuit Courts of Appeal have adopted the forum as the presumptively relevant community for purposes of determining the prevailing market rate for attorneys' fees. (See *In Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983); *In re Agent Orange Product Liability Litigation*, 818 F. 2d 226, 232 (2nd Cir. 1987); *Chrapliwy v. Uniroyal, Inc.*, 670 F. 2d 760, 768 (7th Cir. 1982) *cert. denied*, 461 U.S. 956 (1983); *Avalon Cinema Corp. v. Thompson*, 689 F. 2d 137, 140 (8th Cir. 1982); *Donnell v. United States*, 682 F. 2d 240, 252 (D.C. 1982)).

The proper forum for suit in this case was Ogle County since the situs of the property is here. The court

in its discretion, may decide that the local rate is reasonable where an out-of-town attorney provides legal services which local attorneys could do as well. *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 768 (7th Cir. 1982) *cert. denied*, 461 U.S. 956 (1983). Tampam reads *Chrapliwy* to mandate that the attorney's own rate, not the forum rate, must be applied to the lodestar. We strongly disagree. In *Chrapliwy*, the trial court was reversed for limiting the recovery of plaintiff's attorney's fees to rates in the locality where the court sat. The Seventh Circuit, on review, emphasized that the defendant had invited the use of high-priced, out-of-town attorneys by its own use of similarly expensive non-local attorneys. Additionally, in that case, the trial court did not make a finding that local counsel with the requisite expertise were available to try plaintiff's case. If the court believes that services of equal quality were available at a lower rate in the area where the services were provided, then the judge has discretion to challenge the reasonableness of the out-of-town attorney's billing rate. *Chrapliwy*, 670 F.2d at 769.

In this case, Tampam submitted affidavits as to the value of McMillen's services in the Chicago area. Additionally, Tampam submitted affidavits from two senior members of the Ogle County Bar. Attorney Nye, who filed the original complaint on behalf of Tampam in this matter and continued to be involved until settlement was reached, submitted an affidavit stating that his usual and customary rate for legal services of a like nature is $95.00 per hour. (R. C-334-335). Attorney John B. Roe submitted an affidavit (R. C-336-337) which supported Attorney Nye's $95.00 per hour rate stating that it was consistent

with other senior litigators with comparable skill and seniority within Ogle County.

In addition to the affidavits presented, the court may utilize its own knowledge of prevailing rates in the area. *Lightfoot v. Walker*, 826 F.2d 516, 524 (7th Cir. 1987).

The court made a specific finding that many of the local attorneys could have easily handled this straightforward tax case. Few, if any, would have been reluctant to pursue the matter on behalf of Tampam. Other jurisdictions permit plaintiffs to receive the higher out-of-town rates where it is demonstrated that plaintiff was unable to retain local counsel despite diligent, good faith efforts. *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137, 140-141 (8th Cir. 1982) quoting *Donaldson v. O'Connor*, 454 F. Supp. 311, 315 (N.D. Fla. 1978). See also *Donnell v. U.S.*, 682 F.2d 240, 251 (D.C. Cir. 1982). Tampam provided no evidence to the court which indicated that despite diligent, good faith efforts, it was unable to retain competent, local counsel for this matter. In fact, Tampam provided no evidence that it contacted more than one law firm to represent it in this matter.

Grasping for some type of rationale to justify its request for Attorney McMillen's fee, Tampam claims that much of his work was performed in Chicago and not in Ogle County; and, therefore, he should be compensated at his Chicago rates at least for the hours worked in Chicago. While no precedent exists which gives credence to such an argument, to adopt such a practice could lead to absurd results. Some attorneys from jurisdictions with relatively low prevailing rates may purposefully perform services in locales with higher rates just to increase their

compensation. In *Donnell*, the court held that where much of the work must be performed somewhere other than where the case is tried, that alone was insufficient to deviate from the rule that the *relevant* community for determination of rates of attorney compensation is the one in which the trial court sits. 682 F.2d at 251-252.

Logic and the persuasive reasoning of other jurisdictions which have addressed the issue indicate that even for McMillen's work in the Chicago area, Tampam should receive the forum rate of $95.00 per hour.

III. THIS COURT SHOULD DENY THE WRIT WHERE THE ILLINOIS COURTS PROPERLY REJECTED PLAINTIFF'S PETITION FOR A 50% UPWARD ENHANCEMENT AND PROPERLY DECIDED TO REDUCE THE MCMILLEN AND NYE LODESTARS TO REFLECT THE AMOUNTS INVOLVED AND THE RESULTS OBTAINED.

Tampam petitioned for a 50% upward enhancement of Attorney McMillen's lodestar due to the claimed unusual and difficult nature of this case and the results obtained in the settlement agreement. (R. C-290). An upward enhancement may be awarded in some cases where *exceptional success* has been achieved. *Hensley*, 461 U.S. at 435. (emphasis added). The fee applicant bears the burden of proving that such an enhancement is required to obtain a reasonable fee. *Blum*, 465 U.S. at 898. However, when determining whether to increase the lodestar, neither novelty, complexity, nor results obtained provides the basis for such an increase. These factors are generally subsumed within the other factors used to calculate the lodestar. *Id.* at 898-900.

In this case, the court found that the "exceptional success" requirement necessary for an upward enhancement was clearly absent. (R. C-384). Thus, the court properly exercised its discretion not to award the enhancement which Tampam requested.

In *Hensley*, the court adopted the 12 factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), which provide a framework for trial courts to determine the reasonableness of a fee award pursuant to fee shifting statutes. *Hensley*, 461 U.S. at 429-430, at n.3. From the court's assessment of the case, it may exercise its discretion to reduce the lodestar based on one or more of the *Johnson* factors. *Lynch v. City of Milwaukee*, 747 F.2d 423, 429-430 (7th Cir. 1984). The court, when making an adjustment to the lodestar – either upward or downward – should make it clear that its decision is based upon the results obtained. *Hensley*, 461 U.S. at 437.

In Count I of Tampam's Second Amended Complaint, the Plaintiff enumerates its prayers for relief consisting of six paragraphs. (R. C-154, 158). Tampam was successful in obtaining the relief requested in paragraph 1 – that is, certification as the representative of the proposed class. However, Tampam was totally unsuccessful in obtaining any relief requested in paragraphs 2, 3 and 4. See Stipulation for Settlement (R. C-278-280) and Order Approving Stipulation for Settlement (R. C-281-284). Although the parties agreed that assessments on wasteland in Ogle County would be reduced to $1.00 per acre for 1988 and $0.00 per acre for 1989 and thereafter, Tampam did not obtain the specific relief requested in paragraph 5. Turning to the last paragraph of Count I, Tampam achieved

only partial relief, that being an award of reasonable attorneys' fees, costs and expenses. Therefore, Tampam only achieved status as the class representative, a reduction in the assessments on wasteland, and an award of reasonable attorneys' fees, costs and expenses.

As previously noted, the public roads issue was never viable under §1983 and not compensable pursuant to §1988. Additionally, Tampam abandoned the debasement claim for assessment of fields of irregular shape and size. (R. C-373). While Tampam now disputes that the debasement issue was abandoned, even if it was not abandoned, that issue remains for future negotiation or settlement and was not part of the relief for which Tampam should be compensated. Therefore, Tampam did not prevail on this claim.

The other part of the *Johnson* factor which was used by the court to reduce the lodestar is the "amounts involved". In the case at bar, the amount of taxes which was collected *annually* from all of the wasteland in the *entire* county was *less than* Two Thousand Four Hundred Dollars ($2,400.00). See Affidavit of James Harrison, Ogle County Supervisor of Assessments. (R. C-347). Since there are approximately 5500 parcels of land designated as farm parcels in Ogle County, this amounts to approximately 43 cents ($0.43) (i.e., $2,400 ÷ 5505) per parcel.

Any reduction in the lodestar should be for one of the enumerated factors expressed in *Johnson* and should be expressed in a dollar amount reflecting, as best as possible, the market value of the specific defect. *Lynch v. City of Milwaukee*, (7th Cir. 1984), 747 F. 2d 423, 430. In the case at bar, the court did this very thing.

An abuse of discretion occurs only when no reasonable person could take the view adopted by the trial court. *Lynch*, 747 F. 2d at 426. The trial court did not abuse its discretion in this case.

In this case, the only compensable claim was the wasteland challenge. Additionally, Tampam only achieved a very limited portion of the relief which it sought in Count I of the Second Amended Complaint. Applying this information to this case, the court reduced Attorney McMillen's lodestar by $3,000.00 and attorney Nye's by $800.00 to reflect the amount involved and the results obtained – one of the 12 *Johnson* factors. Thus, the court indicated that it had considered the results which Tampam obtained when it exercised its discretion to reduce the compensation for Attorneys Nye and McMillen.

Petitioner seems to believe that if this Court allows the lower court's decision to stand, or, in the alternative, if this Court grants the Writ but affirms the lower court's decision, then plaintiffs will not be able to select the counsel of their choice. This assertion is absolutely not true. A party can select any attorney it desires for representation; this interpretation for awarding attorneys' fees to prevailing plaintiffs pursuant to 42 U.S.C. §1988 only sets the standard for payment. " . . . it is no part of civil rights law to overcompensate successful plaintiffs" *Lenard*, 808 F. 2d at 1248.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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(3)

No. 91-371

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TAMPAM, INC.,

Petitioner,

v.

OGLE COUNTY BOARD OF REVIEW,
SUPERVISOR OF ASSESSMENTS FOR OGLE COUNTY,
COUNTY TREASURER OF OGLE COUNTY,
also acting as Collector of Taxes, and
THE COUNTY OF OGLE,

Respondents.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

REPLY TO BRIEF IN OPPOSITION

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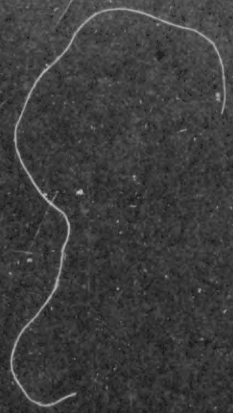

QUESTION PRESENTED

Whether Respondents have advanced any persuasive reason why the Petition for Writ of Certiorari should not be granted so as to permit a full and needed review of the Federal issues presented therein.

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No. 91-371

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Respondents.

REPLY TO BRIEF IN OPPOSITION

ARGUMENT

Petitioner, TAMPAM, Inc. (an acronym) files this Reply Brief pursuant to Supreme Court Rule 15.6. Respondents have raised some quarrels with our Petition but are apparently unable to take any substantial issue with the merits. Their brief argues questions of fact which are either not supported by the record or are contrary

to the record.

The last phrase of Rule 14.1(h) is not applicable to our Petition and in any event is satisfied by the decisions in the Appendices to the Petition. Respondents' counsel admits that the jurisdictional requisites are adequately set forth in the Petition (Brief p. 1, line 1).

Respondents then irresponsibly claim that we attempt to mislead this court in our Statement of the Case (Brief p. 2). This is repeated elsewhere in Respondents' Brief and raises the new issue of ethics in this Court. To the extent that Respondents' arguments might have any bearing on the issues, we will attempt to set the record straight.

Respondents' two argumentative Statements of the Case (Brief p. 2 and p. 3) make the following misleading or unsupported contentions, and we mention

only the most egregious:

1. That Petitioner failed to appear at a hearing scheduled by the Ogle County Board of Review is written twice in succession on p. 2 of the Brief. Petitioner's Statement of the Case does not even mention this Board. The point is entirely irrelevant, was not raised in any court proceeding, and was not mentioned in any decision of either the trial court or the Illinois Appellate Court. If this point was intended to show (erroneously) that Petitioner failed to exhaust administrative remedies, it is of no weight in a cause of action under 42 U.S.C. §1983. Patsy v. Board of Regents, 457 U.S. 496 (1982).

2. That there is nothing in the record to show clear and intentional "discrimination" by the Ogle County Assessor (Brief p. 2). Granting that the majority of the Appellate Court made this same error,

the Second Amended Complaint (and in fact the First Amended Complaint) alleged in par. 8 that the illegal assessments had been a "pattern and practice of the defendants for many years. ... Defendants have knowingly and intentionally continued their discriminatory and unlawful taxing procedures up to the present time." (Petition App. E, pp. 6-7.) The settlement stipulation, we submit, concedes the pertinent allegations of the Second Amended Complaint as to the two taxing procedures then terminated by the trial court.

3. That the "original complaint" was filed by Philip Nye, Jr. and by him alone is not relevant. The original complaint became Count II which, as Respondents' attorneys knows, is not involved in this appeal and for which neither Nye nor any other attorney submitted any petition for fees, as is shown by the itemized Petitions for Fees.

The record also shows that Nye's firm declined to take the case on its merits and stated under oath that no other attorney in the Circuit would do so. Respondents' misstatement thus helps to support Petitioner's compliance with the debatable decision in Chrapilwy v. Uniroyal Inc., 670 F.2d 760 (7th Cir. 1982).

4. The Order Approving Stipulation for Settlement was not drafted by Attorney McMillen (Brief in Opposition p. 5) nor by any attorney for Petitioner. The Order is erroneous because the Stipulation did not settle all matters in dispute. Some of the allegations of illegal taxing procedures remain in the Second Amended Complaint which is still pending in the trial court. Judge Cargerman eventually realized this and sua sponte entered an order for an interlocutory appeal on his fee award. If the case had in fact been fully concluded, then the Appellate Court

should not have heard the interlocutory appeal on attorneys' fees, but neither that Court nor the State's Attorney raised the point. The Appellate Court specifically backed off from becoming involved with the substantive merits of the case (Petition App. A, p. 8).

5. Although the Assistant State's Attorney did argue that the amount of the requested fee was unreasonable, he did not argue that the roads claim was not "viable" under Sec. 1983. This allegation and all of the other allegations of the Amended Complaint and Second Amended Complaint had survived his successive motions to dismiss. If the roads claim was not "viable" as pleaded under Count I, the State's Attorney had no right to settle it.

In fact the State's Attorney did not raise any one of the specific points relied on by the trial court in reducing the

petition from $74,693.91 by successive steps down to $16,345.91. This feat was accomplished solely by Respondents' industrious aide, the trial court judge.

6. Respondents have not distinguished the second holding of Beverly Bank v. Board of Review of Will County, 117 Ill.App.3d 656 (3d Dist. 1983). That court remanded the case for trial under Sec. 1983, based upon a violation of the Equal Protection Clause. This same cause of action is pleaded in par. 8 of Count I of the Second Amended Complaint, citing the 5th and 14th Amendments (App. E, pp. 5, 7). The second prong of the case supports Petitioner.

After Beverly Bank was decided, the United States Supreme Court held that "intentional and purposeful" discrimination need not be shown by the acts of public officials if discrimination in fact occurred. e.g. Zinerman vs. Burch, 110 S.Ct.

975 (1990).

In discussing the constitutional "viability" of the roads claim, Respondents and the trial court also ignore the "taking" clause of the 5th Amendment (Petition p. 6), which was not involved in the Beverly Bank case. The roads claim was filed solely under Count I, based solely on Sec. 1983 which enforces the applicable Federal and Illinois constitutional provisions and statutes, and was constitutionally viable when the claim was settled.

7. On p. 15 of the Brief, Respondents' counsel erroneously states that the Ogle County State's Attorney did not "proffer" an offer of settlement. Except for its inaccuracy, the statement is innocuous. The offer of settlement was made orally by an assistant state's attorney, Douglas Floski, to the Petitioner's counsel when the case was to be set for trial. Being

even more than was sought on the roads and wasteland claims in the Second Amended Complaint, Floski's offer was accepted on the spot, before the case was called. There was no discussion of the other claims of illegal taxation and no discussion of ending the case by a judgment order or dismissal with prejudice. None of the attorneys on the Respondents' Brief participated in this case on the trial level, and Mr. Floski has left.

We do not find the statement, quoted on page 15, lines 1214 of Respondents' Brief, in the record, and it is factually erroneous.

8. Respondents' counsel must have a different edition of Martindale-Hubbell (sic) than we do. None of the three attorneys named on page 15 of the brief appear in the 1991 Edition, and a firm's

rating is based upon the highest rated member. This Court can judicially notice the directory under Federal Rule of Evidence 201(h). Of course, the question of ratings in that publication is not in the record because Mr. Floski never so much as mentioned the Chrapilwy search and find rule.

9. It is true that Petitioner's counsel presided over the second trial in Lenard v. Argento, 808 F.2d 1242 (7th Cir. 1987), Plaintiff's counsel spent 250 hours of their 3,400 hours on the second trial. Nowhere in our Petition do we refer to this case nor to any of the other numerous cases in which we did set fees. We believe all of them were correctly decided on the trial level; only Lenard was reversed.

10. Another cheap shot is the contention that the trial court did not "appoint" Petitioner's counsel to represent

the class. The record shows that Assistant State's Attorney Floski objected to the certification of the plaintiff's class and to Petitioner's attorney representing the class because of an alleged conflict of interest. After research by Ms. Suizzo and the undersigned, it was determined that there was no legal or ethical impediment to continuing the representation of the class by the corporation's attorney. Therefore, the trial court judge overruled the State's Attorney's objection and ruled that the same attorney could represent both the class and the class representative.

11. The trial court cited Chrapilwy (Petition, App. C, p. 44), but not on the point being discussed in the Petition at pp. 32-33. The cases cited by Respondents and by the trial court on their "forum rate" argument (Brief p. 19) are significant, however, to

demonstrate a split between the Circuit Courts of Appeal on this issue. If this Court's terminology "market rate" and "relevant market" means the forum rate, then payment on the basis of the forum guideline violates every fee decision of this Court since Hensley v. Eckerhart, 461 U.S. 424 (1983). The court did not apply a forum rate in Maceira v. Pagan, 698 F.2d 38 (1st in 1983), nor in In Re Agent Orange Product Liability Litigation, 818 F.2d 226 (2d Cir. 1987), both cited by Respondents at p. 17 of their Brief, nor in many other cases where outside counsel voluntarily came in (e.g. Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980 en banc); In Re Fine Paper Anti-Trust Litigation, 751 F.2d 562 (3d Cir. 1984).

Only this Court can clarify and render the terms "market rate" and "relevant market" a bright line for guidance of attorneys and the courts.

12. The record does demonstrate that Petitioner canvassed the local bar of Ogle County to handle this case. Respondents state that we "contacted" only one law firm to do so. This is only half true. Affidavits of Attorney Nye and Attorney McMillen to the effect that no attorney in the Fifteenth Judicial District would take this case on the basis of a fee to be awarded under 42 U.S.C. 1988 are in the record, uncontradicted. (Petition, App. A-1, pp. 40-41). Justice Reinhard's dissent correctly points out that Petitioner did satisfy the requirements of Chrapilwy, however unrealistic they may be.

13. Respondents' final argument (Brief p. 20-23) apparently was added because their other two headings fail to raise any substantial issues to defeat the Petition. We did not raise the question of the 50% enhancement in the Appellate

Court nor in our Petition in this Court. It is not an issue on appeal because Petitioner sees no point in taking up this court's time by an exercise in futility.

CONCLUSION

We regret that this Reply Brief is occupied to a large extent by matters which might more properly be raised by a motion under Rule 11. This argument should have been settled by the Illinois Supreme Court. However, we suspect that it did not wish to become enmeshed with Federal problems over which it has no control.

We reiterate the alternative that this controversy can be resolved expeditiously by reversing the decision of the Illinois Appellate Court, First District, and leaving Justice Reinhard's dissent as the law of the case, or alternatively remanding the case to the

trial court so that Petitioner can be accorded the hearing which it requested on the points raised for the first time by the decision of ex-Judge Cargerman.

Respectfully submitted,

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